SUPREME COURT
OF THE UNITED STATES

No. 11-347
Vide 11-338
Title: Georgia-Pacific West, Inc., et al., Petitioners
v.
Northwest Environmental Defense Center
Docketed: September 19, 2011
Linked with 11A156
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-35266)
Decision Date: May 17, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 29 2011	Application (11A156) to extend the time to file a petition for a writ of certiorari from August 15, 2011 to September 14, 2011, submitted to Justice Kennedy.
Aug 4 2011	Application (11A156) granted by Justice Kennedy extending the time to file until September 14, 2011.
Sep 13 2011	Petition for a writ of certiorari filed. (Response due October 19, 2011)
Sep 22 2011	Consent to the filing of amicus curiae briefs, in support of either party or of netiher party, received from counsel for the petitioners.
Sep 22 2011	Consent to the filing of amicus curiae briefs, in support of ether party or of neither party, received from counsel for the respondent. VIDED.
Sep 30 2011	Order extending time to file response to petition to and including November 18, 2011.
Oct 12 2011	Brief amici curiae of National Association of Counties, et al. filed. VIDED.
Oct 14 2011	Brief amici curiae of Alabama Forestry Association, et al. filed. VIDED.
Oct 14 2011	Brief amici curiae of Arkansas, et al. filed. VIDED.
Oct 17 2011	Brief amici curiae of National Alliance of Forest Owners, et al. filed. VIDED.
Oct 17 2011	Brief amici curiae of American Forest Resource Council, et al. filed. VIDED.
Nov 10 2011	Brief of respondent Northwest Environmental Defense Center in opposition filed. VIDED.
Nov 22 2011	DISTRIBUTED for Conference of December 9, 2011.
Nov 22 2011	Reply of petitioners Georgia-Pacific West, Inc., et al. filed. (Distributed)
Dec 12 2011	The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Breyer took no part in the consideration or decision of this petition.
May 24 2012	Brief amicus curiae of United States filed. VIDED.
Jun 4 2012	Supplemental brief of respondent Northwest Environmental Defense Center filed. VIDED.

Jun 5 2012	DISTRIBUTED for Conference of June 21, 2012.
Jun 5 2012	Supplemental brief of petitioners Georgia-Pacific West, Inc., et al. filed. (Distributed)
Jun 25 2012	Petition GRANTED The petition for a writ of certiorari in No. 11-338 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. Justice Breyer took no part in the consideration or decision of this petition.
Jul 12 2012	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including August 21, 2012. VIDED.
Jul 12 2012	The time to file respondents' brief on the merits is extended to and including October 2, 2012. VIDED.
Jul 18 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent. VIDED.
Jul 19 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 25 2012	The time to file the joint appendix and petitioners' briefs on the merits is further extended to and including August 28, 2012. VIDED
Jul 25 2012	The time to file respondents' brief on the merits is further extended to and including October 16, 2012. VIDED
Aug 22 2012	Brief amici curiae of Association of Oregon Counties, et al. filed. VIDED.
Aug 28 2012	Brief of petitioners Georgia-Pacific West, Inc., et al. filed.
Aug 28 2012	Joint appendix filed. (Jt. Appendix in 2 volumes) VIDED.
Aug 28 2012	Brief amicus curiae of Ruffed Grouse Society filed. VIDED.
Aug 29 2012	Brief amici curiae of American Forest Resource Council, et al. filed. VIDED.
Aug 30 2012	Brief amici curiae of National Governors Association, et al. filed. VIDED.
Sep 4 2012	Brief amicus curiae of United States filed. VIDED.
Sep 4 2012	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed.
Sep 4 2012	Brief amici curiae of Law Professors filed. VIDED.
Sep 4 2012	Brief amicus curiae of Chamber of Commerce of the United States of America filed. VIDED.
Sep 4 2012	Brief amici curiae of Arkansas, et al. filed. VIDED.
Sep 4 2012	Brief amici curiae of National Alliance of Forest Owners, et al. filed. VIDED.
Sep 4 2012	Brief amicus curiae of Mountain States Legal Foundation filed. VIDED. (Distributed)
Sep 4 2012	Brief amici curiae of Society of American Foresters, et al. filed. VIDED.
Sep 4 2012	Brief amici curiae of Pacific Legal Foundation, et al. filed. VIDED.
Sep 4 2012	Brief amici curiae of American Farm Bureau Federation, et al. filed.
Sep 14 2012	SET FOR ARGUMENT ON Monday, December 3, 2012.
Oct 16 2012	Brief of respondents Northwest Environmental Defense Center, et al. filed. VIDED. (Distributed)
Oct 17 2012	CIRCULATED.
Oct 17 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Oct 23 2012	Brief amici curiae of Law Professors on Section 1369(b) Jurisdiction filed. VIDED. (Distributed)
Oct 23 2012	Brief amici curiae of Western Division of the American Fisheries Society, et al. filed.

	VIDED. (Distributed)
Oct 23 2012	Brief amici curiae of Robert Wayland, et al. filed. VIDED. (Distributed)
Oct 23 2012	Brief amicus curiae of Dr. Kevin Boston filed. VIDED. (Distributed)
Oct 23 2012	Brief amici curiae of Pacific Coast Federation of Fishermen's Associations, et al. filed. VIDED. (Distributed)
Oct 23 2012	Brief amici curiae of Environmental Protection Information Center, et al. filed. VIDED. (Distributed)
Oct 23 2012	Brief amici curiae of Law Professors on the Propriety of Administrative Deference filed. VIDED. (Distributed)
Oct 23 2012	Brief amici curiae of Northwest Environmental Advocates, et al. filed. VIDED. (Distributed)
Oct 30 2012	Letter dated October 30, 2012, with attached Eleventh Circuit Decision, received from counsel for respondent Northwest Environmental Defense Center. Filed. VIDED. (Distributed)
Nov 13 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Breyer took no part in the consideration or decision of this motion.
Nov 14 2012	Reply of petitioners Georgia-Pacific West, Inc., et al. filed. (Distributed)
Nov 30 2012	Letter from counsel for petitioners Georgia-Pacific West, Inc., et al., received and distributed. VIDED
Dec 3 2012	Argued. For petitioners: Timothy S. Bishop, Chicago, Ill.; and Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Jeffrey L. Fisher, Stanford, Cal.
Jan 8 2013	The motion of petitioners in No. 11-338 for leave to file a supplemental brief after argument is granted. The other parties to these cases and the Solicitor General may file supplemental briefs, not to exceed 3,000 words each, addressing the effect of the Environmental Protection Agency s amendment to its stormwater-discharge rule on or before Tuesday, January 22, 2013. Justice Breyer took no part in the consideration or decision of this motion. VIDED

RECORD AND BRIEF

No. 11 347

Supreme Court, U.S.
FILED
SEP 13 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since passage of the Clean Water Act, the Environmental Protection Agency has considered runoff of rain from forest roads—whether channeled or not—to fall outside the scope of its National Pollutant Discharge Elimination System ("NPDES") and thus not to require a permit as a point source discharge of pollutants. Under a rule first promulgated in 1976, EPA consistently has defined as *non*point source activities forest road construction and maintenance from which natural runoff results. And in regulating stormwater discharges under 1987 amendments to the Act, EPA again expressly excluded runoff from forest roads. In consequence, forest road runoff long has been regulated as a nonpoint source using best management practices, like those imposed by the State of Oregon on the roads at issue here. EPA's consistent interpretation of more than 35 years has survived proposed regulatory revision and legal challenge, and repeatedly has been endorsed by the United States in briefs and agency publications.

The Ninth Circuit—in conflict with other circuits, contrary to the position of the United States as amicus, and with no deference to EPA—rejected EPA's longstanding interpretation. Instead, it directed EPA to regulate channeled forest road runoff under a statutory category of stormwater discharges "associated with industrial activity," for which a permit is required. The question presented is:

Whether the Ninth Circuit should have deferred to EPA's longstanding position that channeled runoff from forest roads does not require a permit, and erred when it mandated that EPA regulate such runoff as industrial stormwater subject to NPDES.

RULES 14.1 AND 29.6 STATEMENT

Defendants-appellees below and petitioners here are Georgia-Pacific West LLC, Hampton Tree Farms, Inc., Stimson Lumber Company, and Swanson Group, Inc. Intervenor defendants-appellees below and petitioners here are American Forest and Paper Association, Oregon Forest Industries Council, and Tillamook County, Oregon.

Additional defendants-appellees below were Marvin Brown, Oregon State Forester, in his official capacity, and Stephen Hobbs, Barbara Craig, Diane Snyder, Larry Giustina, Chris Heffernan, William Hutchison, and Jennifer Phillippi, members of the Oregon Board of Forestry, in their official capacities. The State defendants-appellees are filing a separate certiorari petition.

Petitioner Georgia-Pacific West LLC (formerly Georgia-Pacific West, Inc.) is a privately held Oregon limited liability company, the sole member of which is Georgia-Pacific LLC, a privately held Delaware limited liability company. The ultimate, indirect parent of Georgia-Pacific LLC is Koch Industries, Inc. No publicly held company owns 10 percent or more of the membership interests or stock of Georgia-Pacific LLC or Koch Industries, Inc., respectively.

Petitioner Hampton Tree Farms, Inc. is a family owned corporation, the parent of which is Hampton Resources, Inc., a family held Oregon corporation. No publicly held company owns 10 percent or more of the stock of Hampton Resources, Inc.

Petitioner Stimson Lumber Company is a family owned corporation organized under the laws of Oregon. It has no parent company, and no publicly held company owns 10 percent or more of its stock.

Petitioner Swanson Group, Inc. is a family owned corporation organized under the laws of Oregon. No publicly held company owns 10 percent or more of its stock.

Petitioner American Forest and Paper Association is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. No parent corporation or publicly held company has a 10 percent or greater ownership interest in AF&PA.

Petitioner Oregon Forest Industries Council is a mutual benefit corporation organized under the laws of Oregon and Section 501(c)(6) of the Internal Revenue Code. It has no parent corporation and no publicly held company owns a 10 percent or greater interest in OFIC.

Petitioner Tillamook County is a governmental unit of the State of Oregon, with a population of approximately 25,000 persons. Some 44 percent of the land within the County's borders is State-owned, most as part of Tillamook State Forest, and 93 percent of the County is classified as forest land.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 640 F.3d 1063. The opinion of the district court (App., *infra*, 48a-68a) is reported at 476 F.Supp.2d 1188.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2010. After the court of appeals extended the time to file, petitioners filed a timely petition for rehearing and rehearing en banc on October 5, 2010. The court issued an amended opinion on May 17, 2011. By order of the same date, the court denied the petitions for panel and en banc rehearing. App., *infra*, 2a. On August 4, 2011, Justice Kennedy extended the time for filing petitions for certiorari to September 14, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced at App., *infra*, 69a-80a.

STATEMENT

Plaintiff Northwest Environmental Defense Center ("NEDC") brought a citizen suit under Clean Water Act ("CWA") § 505, 33 U.S.C. § 1365, against forest products companies, petitioners here, and the Oregon State Forester and members of the Oregon Board of Forestry (the "State defendants"). Petitioners American Forest & Paper Association, Oregon Forest Industries Council, and Tillamook County in-

tervened in support of defendants. Plaintiff alleges that defendants violated CWA §§ 301 and 402 because "ditches, channels, culverts, pipes and other 'point sources'" along the Trask and Sam Downs Roads and at "hundreds of other locations" throughout Oregon State Forests discharge precipitation runoff containing pollutants into Oregon waters without a National Pollutant Discharge Elimination System ("NPDES") permit. First Am. Cmplt. ¶¶ 1-6.

NEDC alleges that the Trask and Sam Downs Roads are State-owned roads used by petitioner companies for hauling timber. Under timber sale contracts with the Oregon Department of Forestry, petitioner companies maintain the roads as needed. Petitioners' use of these public roads, plaintiff alleges, creates sediment and other pollutants that are carried by runoff into roadside culverts and ditches and eventually deposited into navigable waters. First Am. Cmplt. ¶ 5. Plaintiff alleges that, as a result, defendants were required to obtain NPDES permits from Oregon's Department of Environmental Quality —to which EPA has delegated the NPDES program. *Id.* ¶¶ 32, 77. NEDC sought injunctive and declaratory relief, penalties, and attorneys' fees. *Id.* ¶ 1.

Defendants and intervenors moved to dismiss. As relevant here, their motion relied on EPA's Silvicultural Rule, 40 C.F.R. § 122.27, under which natural runoff from forest roads is categorized as nonpoint source activity that does not require an NPDES permit, and on EPA stormwater regulations that exclude forest road runoff from permitting. The United States filed an amicus brief in support of dismissal, urging deference to EPA's interpretation of the CWA and its own rules. App., *infra*, 93a-133a. The district court dismissed, reasoning that the roads and asso-

ciated runoff collection systems are nonpoint sources and that EPA's Silvicultural Rule applies. App., *infra*, 48a-68a.

The Ninth Circuit reversed, rejecting the views of EPA set forth in an amicus brief and at argument. App., *infra*, 1a-47a. It held, first, that although EPA *intended* the Silvicultural Rule to define runoff collected in ditches and culverts as a nonpoint source, those ditches and culverts are in fact point sources that require NPDES permits. Second, the court held, channeled runoff from forest logging roads is stormwater discharge "associated with industrial activity" under Section 402(p) of the CWA that must be permitted. These rulings conflict with decisions of the Second, Eighth, and Eleventh Circuits; disregard the proper relationship between executive and judicial authority set forth in this Court's precedents; and undermine the role of the States under the Clean Water Act.

EPA has not since passage of the CWA required permits for forest roads used to transport timber. By its Silvicultural Rule, it has for 35 years defined natural runoff from such roads—including runoff collected by drainage systems that are an integral part of forest road construction and operation—as nonpoint source pollution to be addressed by best management practices rather than point source effluent standards. EPA's position has repeatedly been set forth in iterations of the Silvicultural Rule, explanations of the rule, and briefs.

After 1987 amendments to the CWA established a new, two-phase, regime for regulating stormwater, EPA maintained the same position. When EPA implemented Congress's "Phase I" mandate that stormwater "associated with industrial activity" be

subject to NPDES, EPA provided that stormwater runoff defined by the Silvicultural Rule as nonpoint source was not covered by this requirement. And when EPA in "Phase II" considered what other stormwater might appropriately be permitted under NPDES, it weighed extending permitting to forest roads, but ultimately did not do so.

The Ninth Circuit not only disapproved EPA's interpretation of the Act and EPA's own rules, but also *required* EPA to regulate collected natural runoff from forest roads as stormwater "associated with industrial activity"—even though that statutory phrase plainly leaves discretion to EPA. Substituting its own views for those of the agency, the Ninth Circuit violated fundamental tenets of administrative law and created its own flawed environmental policy.

EPA's consistent position of 35 years is reasonable. Natural runoff over thousands of miles of forest roads is more effectively addressed, EPA determined, by best management practices ("BMPs") rather than by effluent limitations normally applied to end-pipe discharges. Indeed, Oregon has specifically required drainage systems like those on the Trask and Sam Downs Roads as BMPs to reduce water pollution.

The Ninth Circuit's ruling is environmentally counterproductive, forcing an effluent limitation regime onto natural runoff for which it is a poor fit. It would divert resources from addressing pollution through more effective BMPs to costly and time-consuming permitting and litigation. It could even, perversely, cause states to alter road drainage system requirements in order to reduce point-source permitting costs and risks. The Ninth Circuit should have deferred to EPA's long-standing interpretation of the CWA and its own regulations, as other courts

of appeals have done. This Court's review is urgently required to resolve the resulting split in the Circuits, to restore EPA and State authority, and to bring certainty to users of forest roads, who face the risk of criminal and civil penalties and citizen enforcement if permits are required.

A. The Federal Statutory Context.

The Clean Water Act balances federal and state powers, forming "a partnership" "animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992).

CWA § 402 creates the NPDES permitting system for "point sources" that "discharge" "any pollutant" to U.S. waters. 33 U.S.C. § 1342(a); see CWA § 301(a), 33 U.S.C. § 1311(a). A "point source" is "any discernible, confined and discrete conveyance," including a "ditch, channel, tunnel [or] conduit," from which pollutants are discharged to navigable waters. CWA § 502(14), 33 U.S.C. § 1362(14). But the term "point source" expressly "does not include agricultural stormwater discharges." *Ibid.*

Beyond Section 402 and the separate Section 404 permit scheme for dredged and fill material, Congress largely left the task of addressing water pollution to the States, with federal assistance and oversight. See *The Clean Water Act Handbook* 191-220 (M. Ryan ed. 2003). Consistent with Congress's purpose to "preserv[e] and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "plan the development and use" of "land and water" (CWA § 101(b), 33 U.S.C. § 1251(b)), States are responsible for establishing

water quality standards (CWA § 303(a), 33 U.S.C. § 1313(a)) and for developing programs to manage nonpoint sources of water pollution like runoff. CWA §§ 208, 303(d), 319, 33 U.S.C. §§ 1288, 1313(d), 1329.

Congress understood that "nonpoint sources of pollutants" include "agricultural and silvicultural activities" such as "runoff from fields and crop and forest lands." CWA § 304(f)(1) & (2)(A), 33 U.S.C. § 1314(f)(1) & (2)(A). It directed EPA to assist States in developing "procedures and methods," including "land use requirements" like BMPs, "to control to the extent feasible" "silviculturally related nonpoint sources of pollution." 33 U.S.C. § 1288(b)(2)(F).

B. EPA's Silvicultural Rule.

1. Since passage of the CWA—the Ninth Circuit recognized—EPA has "treat[ed] all natural runoff" from most silvicultural activities "as nonpoint pollution, even if channeled and discharged through a discernible, confined and discrete conveyance" like a roadside ditch or culvert. App., *infra*, 22a; see *id.* at 24a ("collected runoff from silviculture" is "categorically" not subject to NPDES), 32a ("the intent of EPA" is to define "all natural runoff from silvicultural activities" as nonpoint source, "irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged").

EPA promulgated a rule in 1973 providing that "[d]ischarges of pollutants from agricultural and silvicultural activities," including "runoff" from "forest lands," "do not require an NPDES permit" unless identified by regulators "as a significant contributor of pollution." App., *infra*, 17a, quoting 40 C.F.R. § 125.4(j) (1975). When that rule was challenged, EPA told a district court that the "exempted catego-

ries" are "ill-suited for inclusion in a permit program." *Natural Res. Def. Council* v. *Train*, 396 F.Supp. 1393, 1395 (D.D.C. 1975), aff'd *sub nom. Natural Res. Def. Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

2. The district court in *Train* held the exemption in the 1973 rule too broad and suggested that EPA use its authority to identify specific nonpoint source activities as a means of managing its program. See 396 F.Supp. at 1401-1402 ("Congress intended for [EPA] to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources"), aff'd, 568 F.2d at 1382 ("'power to define point and nonpoint sources is vested in EPA'").

When EPA revisited the rule, it explained that agriculture and silviculture "present runoff-related problems not susceptible to the conventional NPDES permit program including effluent limitations." App., *infra*, 18a-19a, quoting 40 Fed. Reg. 56932 (Dec. 5, 1975). EPA stated that "*whether or not the rainfall happens to collect before flowing into navigable waters*"—as "[a]gricultural and silvicultural runoff * * * frequently flows into ditches * * * before discharging"—such runoff "is more properly regulated under section 208" by States as "nonpoint in nature and should not be covered by the NPDES permit program." *Id.* at 19a (emphasis added).

Accordingly, when EPA proposed the Silvicultural Rule in 1976, it "determined that most water pollution related to silvicultural activities is nonpoint in nature." App., *infra*, 19a, quoting 41 Fed. Reg. 6282 (Feb. 12, 1976). "Only those silvicultural activities" where a discharge from a point source results from "controlled water used by a person" were to be

subject to NPDES permitting. *Id.* at 19a-20a. EPA's final rule identified four "controlled water" discharges—from "rock crushing, gravel washing, log sorting," and "log storage facilities." App., *infra*, 20a, citing 41 Fed. Reg. 24709, 24711 (June 18, 1976); 40 C.F.R. § 124.85 (1976). The Ninth Circuit explained that in consequence of this rule, "[a]ny other silvicultural discharge of pollutants, even if made through a discernible, defined and discrete conveyance, was considered a nonpoint source of pollutants." App., *infra*, 20a.

EPA explained its basis for defining most silvicultural discharges as nonpoint source: the pollutants discharged were "induced by natural processes, including precipitation" and "runoff"; were "not traceable to any discrete and identifiable facility"; and were "better controlled through the utilization of best management practices." App., *infra*, 21a, quoting 41 Fed. Reg. 24710 (June 18, 1976). Under these criteria, the final rule stated in a comment, "[t]he term 'silvicultural point source' * * * does not include nonpoint source activities inherent to silviculture such as * * * surface drainage, and road construction and maintenance from which runoff results from precipitation events." *Id.* at 22a, quoting 40 C.F.R. § 124.85 (1976). EPA stated that, pursuant to this rule, "'*ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program.*'" *Id.* at 23a, quoting 41 Fed. Reg. 6282 (Feb. 12, 1976) (emphasis added). Rather, "runoff from road construction and maintenance for the purposes of forest management falls more generally under the characteristics of nonpoint source pollution." 41 Fed. Reg. 24711 (June 18, 1976).

3. The current version of EPA's Silvicultural Rule, promulgated in 1980, differs "in only minor respects." App., *infra*, 26a. It retained the four "silvicultural point sources." 40 C.F.R. § 122.27(b), App., *infra*, 26a-27a. And it moved the definition of "nonpoint source silvicultural activities" from the comment to the text of the rule, slightly modifying the language to provide that nonpoint source activities include "surface drainage, or road construction and maintenance from which there is natural runoff." *Ibid.*; see 45 Fed. Reg. 33290, 33446-33447 (May 19, 1980).

Substituting "from which there is natural runoff" for "from which runoff results from precipitation events" was not a substantive change. EPA made clear that after this change, runoff from forest roads, "*although sometimes channeled*," remains "non-point source in nature" because it is "caused solely by natural processes, including precipitation and drainage," is "not otherwise traceable to any single identifiable source," and is "best treated by non-point source controls." 55 Fed. Reg. 20521, 20522 (May 17, 1990) (emphasis added).

4. In 1999, EPA proposed to modify 40 C.F.R. § 122.27 to replace the categorical treatment of runoff from silvicultural activities with case-by-case consideration of whether a permit is required in order to achieve water quality standards. See 64 Fed. Reg. 46058, 46077, 46088 (Aug. 23, 1999). Following public comment EPA abandoned that proposal. See 65 Fed. Reg. 43586, 43652 (July 13, 2000).

C. Stormwater Regulation Under The 1987 Amendments To The Clean Water Act.

As enacted in 1972 the CWA made no distinction between stormwater and other sources of pollutants. But in 1987 Congress enacted a new two-step regime for regulating point sources that convey stormwater into navigable waters. 33 U.S.C. § 1342(p).

In Phase I, Congress identified five classes of stormwater discharges that required NPDES permits, including discharges "associated with industrial activity." CWA § 402(p)(1)-(3), 33 U.S.C. § 1342(p)(1)-(3). EPA's 1990 regulations implementing Phase I defined "associated with industrial activity" to mean discharges "*directly related* to manufacturing, processing, or raw materials storage areas *at an industrial plant*." 40 C.F.R. § 122.26(b)(14) (emphasis added). And they provided that Phase I permitting does not apply to "discharges from facilities or activities excluded from the NPDES program under this Part 122" (*ibid.*), which includes the silvicultural exclusion at § 122.27. See 55 Fed. Reg. 47990, 48011 (Nov. 16, 1990) ("existing regulations at 40 CFR 122.27 currently define the scope of the NPDES program with regard to silvicultural activities," and "EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking").

Phase II required EPA to consider whether additional stormwater discharges should be subject to NPDES. CWA § 402(p)(6). In developing Phase II regulations, EPA explained that its Phase I regulations excluded "runoff from agricultural and silvicultural activities." EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program*, at 2-23 n.8 (Mar. 1995). And in listing "Timber Products Facilities" that are "associated

with industrial activity" and hence subject to Phase I permitting, EPA identified cutting, planing, loading, sorting and storing logs, and manufacturing, assembling, and preserving wood products, but not the use of forest roads to transport timber. *Id.*, Appendix E, at E-2-3.

In Phase II rules promulgated in 1999, EPA designated two categories of stormwater discharge that "present a high likelihood of having adverse water quality impacts": small municipal storm sewer systems and some construction sites. EPA, *NPDES—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges*, 64 Fed. Reg. 68722, 68734 (Dec. 8, 1999). EPA reached this decision after considering studies that showed urban storm sewers and construction pollution were a much more serious problem than pollution from "agricultural" or "silvicultural" sources. *Id.* at 68726-68727. See EPA, *Stormwater Phase II Final Rule, Construction Site Runoff Control, Minimum Control Measures* 1 (rev'd Dec. 2005) ("Sediment runoff rates from construction sites" are "1,000 to 2,000 times greater than those of forest lands").

An environmental group challenged EPA's decision not to require Phase II permitting of discharges from roads used for logging. In *Environmental Defense Center* v. *EPA*, 344 F.3d 832, 861 (9th Cir. 2003), the Ninth Circuit remanded the rule to EPA to explain its decision not to apply NPDES to forest roads under Phase II, but did not strike down the rule. Since 2003, EPA has taken no public action on that remand.

D. Oregon's Regulation Of Runoff From Forest Roads.

Consistent with this statutory and regulatory scheme, States regulate forestry operations, including forest roads, using best management practices adapted to their own "climate, soils, topography, and aquatic biota." Erik Schilling, Nat'l Council for Air and Stream Improvement, *Compendium of Forestry Best Management Practices for Controlling Nonpoint Source Pollution in North America* 194 (Tech. Bull. 966, Sept. 2009). EPA provides States with guidance in the design and implementation of BMPs. See, *e.g.*, Karen Sorali, U.S. Dep't of Agriculture Forest Service, *Forestry Best Management Practices in Watersheds*, available at http://www.epa.gov/owow/watershed/wacademy/acad2000/forestry/index.htm. And "all jurisdictions in North America with substantial levels of timber harvest have made substantial investments in their forestry [nonpoint source] control programs," which are "based on BMPs that have been proven effective through research and practical experience" and that are backed by "monitoring programs" that "report generally high levels of compliance and/or few significant risks to water quality." Schilling, *supra*, at 196.

Like other States, Oregon regulates runoff from forest roads as nonpoint source pollution. By statute, the Oregon Board of Forestry is charged, in consultation with Oregon's Environmental Quality Commission, with establishing BMPs "to insure that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair" achievement of the State's water quality standards. Or. Rev. Stat. § 527.765(1), (2).

Oregon's Board of Forestry has promulgated "standards for locating, designing, constructing and maintaining efficient and beneficial forest roads" in a manner that provides "maximum practical protection" for "water quality." Or. Admin. R. § 629-625-0000(3). Roads must be located, constructed, and operated to minimize "risk of sediment delivery to waters of the state." *Id.* § 629-625-0330; see *id.* § 629-625-0200(2) & -0300(2). To meet this goal, road operators must "provide a drainage system" that satisfies six criteria. *Id.* § 629-625-0330(1). As Oregon explained to the Ninth Circuit, "drainage ditches and culverts" are among the "best management practices" it has adopted. Br. of the State Appellees, No. 07-35266, at 18-20.

E. The District Court's Decision Dismissing Plaintiff's Suit.

The District Court dismissed NEDC's suit for failure to state a claim. Judge King determined that under the Silvicultural Rule "the building and maintenance of the forest roads and the hauling of timber on the roads" are "not point sources when the natural runoff flows into the waters of the United States." App., *infra*, 62a. Rather, the "road/ditch/culvert system and timber hauling on it is a traditional dispersed activity from which pollution flowing into the water cannot be traced to single discrete sources." *Ibid.* In so holding, the District Court deferred to EPA's interpretation of its own rule, citing *Auer* v. *Robbins*, 519 U.S. 452 (1997).

Given this holding, the court did not reach the question whether those discharges are otherwise excluded from permitting under the stormwater amendments and regulations. It did, however, reject plaintiff's argument that NPDES permits are re-

quired as a result of the Ninth Circuit's previous remand of EPA's Phase II regulations in *EDC*, 344 F.3d 832. As the District Court explained, the Ninth Circuit remanded to allow EPA to address objections and thereby "'permit judicial review,'" not because the regulations were substantively deficient. App., *infra*, 65a-66a. And "'[w]hen [EPA's] Phase II regulations went into effect, a stormwater discharge left unregulated'" as a point source, like forest road runoff, complied with the CWA. *Id.* at 67a.

F. The Ninth Circuit's Decision Ordering EPA To Regulate Forest Road Runoff As An Industrial Stormwater Discharge.

The Ninth Circuit reversed. It conceded that when read to "reflect the intent of EPA," the Silvicultural Rule defines "natural runoff from silvicultural activities" as a nonpoint source regardless of whether "the runoff is collected, channeled, and discharged into protected water." App., *infra*, 32a. But the court thought this reading inconsistent with the CWA's definition of "point source." It substituted its own reading of the rule—one it acknowledged "does not reflect the intent of EPA." *Ibid.* Under the court's reading, forest road runoff is nonpoint source "only as long as the 'natural runoff' remains natural" and is not "channeled and controlled." *Ibid.*

The Ninth Circuit then held that the discharges at issue are "associated with industrial activity" and thus require NPDES permits under Phase I of EPA's stormwater regulations. App., *infra*, 38a. It did so even though it acknowledged that EPA regulations define "discharges 'associated with industrial activity'" not to include discharges that are "excluded from the NPDES program under [the Silvicultural Rule]." *Ibid.*; see *ibid.* (the "preamble to the Phase I

regulations makes clear EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program mandated by § 402(p)").

In response to petitions for rehearing, the Ninth Circuit addressed whether it had subject matter jurisdiction to reject EPA's reading of the Silvicultural Rule under 33 U.S.C. § 1365(a). App., *infra*, 5a-7a. According to the court, jurisdiction turned on whether the Silvicultural Rule is ambiguous. If *un*ambiguous, then NEDC would have had to challenge the Rule within 120 days of its issuance, a window that closed decades ago. 33 U.S.C. § 1369(b)(1). But because the court concluded the rule is ambiguous, it found jurisdiction. It held that NEDC's challenge is based on "grounds which arose after such 120th day," because the United States' definitive interpretation of the rule occurred for the first time in this litigation. App., *infra*, 7a. The court did not reconcile this reasoning with its own citations to EPA materials dating back to 1976 that clearly state that channeled forest road runoff is nonpoint source. Nor did it explain the jurisdictional basis for its rejection of EPA's Phase I rule.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Ninth Circuit, in conflict with decisions of other circuits, cast aside more than three decades of EPA regulation and impermissibly imposed its own reading of the CWA on EPA, the States, and the regulated community. In doing so, it violated the most basic tenets of judicial review of administrative action, upended the federal-state balance struck by Congress, and imposed a costly and poor-fitting effluent-control regime that is more likely to harm than help the environment. These errors also led the

court of appeals to assert jurisdiction when the time for challenging the Silvicultural Rule (in the court of appeals in the first instance, not the district court) expired decades ago. The vast reach of the Ninth Circuit over hundreds of millions of acres of western forests magnifies the impact of its erroneous decision.

I. IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, THE NINTH CIRCUIT FAILED TO DEFER TO EPA'S INTERPRETATION OF THE CLEAN WATER ACT.

A. This Court's Precedents Require Deference To EPA's Silvicultural And Stormwater Rules.

This Court's precedents establish the deference due by a court to an agency's interpretation of a statute. When Congress has delegated to an agency the authority to implement a statute by rulemaking—as Congress did here—"a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); see *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). Furthermore, an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); see *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 129 S.Ct. 2458, 2472-2474 (2009) (deferring to EPA's reasonable explanation of ambiguous CWA regulations, set forth in an internal memorandum); *Talk America, Inc.* v. *Michigan Bell Tel. Co.*, 131 S.Ct. 2254, 2260-2262 (2011). This Court has explained that def-

erence is necessary because "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996).

The Ninth Circuit violated these precepts. It accorded no deference at all to EPA's rules or interpretation of those rules. And it commanded EPA to interpret the statutory phrase "associated with industrial activity" to include discharges of channeled forest road runoff, thereby substituting its own views for those of the expert agency and wreaking havoc on a regulatory scheme that has been in place for more than 35 years.

1. On its face, the CWA defines the term "point source" "not [to] include agricultural stormwater discharges." CWA § 502(14), 33 U.S.C. § 1362(14). Silviculture is a form of agriculture. *E.g.*, www.wvu.edu/~agexten/forestry/silvics.htm ("Silviculture is the agriculture of trees"); John Gifford, *Practical Forestry* 12 (1907) ("silviculture is a branch of agriculture"). Congress treated the two together when it specified in section 304(f) of the Act that "nonpoint sources of pollutants" include "agricultural and silvicultural activities" like "runoff from fields and crop and forest lands." 33 U.S.C. § 1314(f)(1) & (2)(A). See 33 U.S.C. § 1288(b)(2)(F) (directing EPA to assist States to develop BMPs "to control to the extent feasible" "agriculturally and silviculturally related nonpoint sources of pollution").

2. Consistent with this Congressional intent, EPA has always treated precipitation runoff from

silvicultural activities as nonpoint source in nature. Its 1973 rule broadly exempted "[d]ischarges of pollutants from agricultural and silvicultural activities." 40 C.F.R. § 125.4(j) (1975). In promulgating the Silvicultural Rule in 1976, EPA "determined that most water pollution related to silvicultural activities is nonpoint in nature." 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976). It required an NPDES permit only for silvicultural discharges resulting from "controlled water use"—specifically in "rock crushing, gravel washing, log sorting," and "log storage facilities." 41 Fed. Reg. 24709, 24711 (June 18, 1976); 40 C.F.R. § 124.85 (1976). Precipitation runoff from forest roads is none of those, and does not result from the controlled use of water.

The current version of the Silvicultural Rule continues to define a "silvicultural point source" as "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities." 40 C.F.R § 122.27(b). And it expressly defines as "nonpoint source" all discharges from "surface drainage, or road construction and maintenance from which there is natural runoff." *Ibid.*; see 45 Fed. Reg. 33290, 33446-33447 (May 19, 1980). EPA considered replacing this categorical definition for case-by-case inquiry, but decided against making that change. See *supra*, p. 9.

3. Throughout, EPA has left no doubt that precipitation runoff from forest roads is nonpoint source in nature even when it is channeled by roadside ditches and culverts. In 1975, EPA explained that "silvicultural runoff * * * frequently flows into ditches" before discharge, but that "whether or not the rainfall happens to collect before flowing into

navigable waters," it "is properly regulated under section 208" by States as "nonpoint in nature and should not be covered by the NPDES permit program." 40 Fed. Reg. 56932 (Dec. 5, 1975).

Accordingly, in promulgating the 1976 Rule, EPA stated that "'ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be the subject of the § 402 permit program.'" 41 Fed. Reg. at 6282 (Feb. 12, 1976). See also 41 Fed. Reg. 24709 (June 18, 1976) ("Insofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should also be considered nonpoint in nature"); 55 Fed. Reg. 20521, 20522 (May 17, 1990) (runoff from forest roads, "although sometimes channeled," is "non-point source in nature"). The Ninth Circuit thus correctly discerned that EPA treats "discharges of 'natural runoff' [as] nonpoint sources of pollution, even if" they "are channeled and controlled" through ditches and culverts. App., *infra*, 27a.

This interpretation reflects EPA's practice. EPA does not, in fact, require NPDES permits for channeled forest road runoff, and has not done so since passage of the CWA. Instead, EPA provides states with information and assistance to promulgate best management practices to control forest road runoff. And states have in fact adopted and monitored BMPs best suited to their own conditions, providing effective nonpoint source regulation. See *supra*, pp. 12-13.

4. EPA has provided cogent reasons for not requiring permits for silvicultural runoff. See *Chemical Mfrs. Ass'n* v. *Nat. Res. Def. Council*, 470 U.S. 116, 125 (1985) (EPA's interpretation must be upheld if it "is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA"). From the

start, EPA explained that effluent limitations are not a reasonable or practical means to address silvicultural precipitation runoff. See 40 Fed. Reg. 56932 (Dec. 5, 1975). The three pillars of EPA's interpretation are that runoff is "induced by natural processes, including precipitation"; is "not traceable to any discrete and identifiable facility"; and is "better controlled through the utilization of best management practices" than effluent limitations. 41 Fed. Reg. at 24710 (June 18, 1976); see 55 Fed. Reg. 20521, 20522 (May 17, 1990); http://water.epa.gov/polwaste/nps/forestry/forestrymgmt_index.cfm (describing EPA-recommended BMPs).

5. After Congress enacted a new regime for stormwater regulation in 1987, EPA continued to treat channeled runoff from forest roads as nonpoint source in nature. Congress in section 402(p) required EPA to establish "Phase I" permitting for point source discharges of stormwater "associated with industrial activity." In implementing that provision, EPA limited permitting to point source discharges "directly related to manufacturing, processing, or raw materials storage areas at an industrial plant"—language that on its face does not describe runoff from public roads used to haul timber. 40 C.F.R. § 122.26(b)(14). The statutory terms "associated with" and "industrial activity" "comfortably bea[r] the meaning the [Administrator] assigns" in that regulation. *Auer*, 519 U.S. at 461.

Furthermore, EPA's rule provides that the Phase I permit requirement "does not include discharges from facilities or activities excluded from the NPDES program under this Part 122." 40 C.F.R. § 122.26(b)(14). That provision incorporates the settled meaning of the Silvicultural Rule, described

above, to exclude channeled stormwater runoff from forest roads.[1]

In Phase II, EPA studied discharges from forest products facilities, explained which ones qualified as associated with industrial activities, and chose not to require permits for channeled discharges from forest roads, signaling no change from its long-held position under the Silvicultural Rule. See *supra*, pp. 10-11.

6. EPA has maintained the same position in litigation. In a 2003 brief urging dismissal of a suit alleging that runoff from forest roads collected in "ditches, channels, pipes, [and] culverts" must be permitted, EPA told the court that "discharge associated with an industrial activity" "'does not include discharges from facilities or activities excluded from the NPDES program under this part 122'"; that Part 122.27 "excluded runoff from certain silvicultural activities from the NPDES program"; and that, "[c]onsequently, EPA did not incorporate silvicultural storm water discharges into the definition of 'storm water discharges associated with industrial activities.'" EPA's Mem. in Support of PALCO's Mot. to Dismiss, *Env. Protection Info. Ctr.* v. *Pacific Lumber Co.*, No. C01-2821 (N.D. Cal. filed Nov. 17, 2003),

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[1] EPA included in Phase I regulation timber-related industrial facilities that fall within Standard Industrial Code groupings 10 through 45, such as lumber mills, including their "industrial plant yards" and "immediate access roads." 40 C.F.R. § 122.26(b)(14); see EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program*, at 2-22 to 23 & E-2 to 4 (Mar. 1995). But EPA observed that "NPDES regulations specifically exempt some categories of activity from the definition of point source, including storm water runoff from agricultural sources and silviculture activities. *Id.* at 2-23 n.8.

at 4, App., *infra*, 86a-87a. Furthermore, "EPA declined to regulate discharges from forest roads in the Phase II rulemaking." *Id.* at 6, App., *infra*, 90a. Accordingly, EPA explained, "storm water discharges from forest roads are not currently subject to NPDES permit requirements, and will not be subject to them, unless and until EPA regulates them under" Phase II (App., *infra*, 91a)—which EPA has not done in the eight years since it filed that brief. See also U.S. Amicus Br. in *Conservation Law Foundation* v. *Hannaford Bros.*, No. 2:03-cv-00121 (D. Vt. filed Jan. 23, 2004).

To the district court here, the United States explained why "forestry roads like those at issue in this case are not required to secure NPDES permits under a proper construction of section 402 of the CWA," and why "[a] contrary determination would have significant implications for EPA." U.S. Amicus Br., *NEDC* v. *Brown*, 3:06-cv-01270 (N.D. Or. filed Dec. 6, 2006), at 2, App., *infra*, 98a. Among other things, the United States pointed out that because "ditches [and] culverts" are "an integral part of forest roads," "reading them as outside the scope of the [Silvicultural Rule] does not make any sense because it defeats the plain language of the regulation." *Id.* at 17, App., *infra*, 114a. And it called for "[e]levated deference" because EPA "has 'consistently followed' the same interpretation of its regulations." App., *infra*, 115a.

In its brief to the Ninth Circuit, the U.S. again explained that "EPA has made it clear that the term 'natural runoff' in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts." U.S. Amicus Br., *NEDC* v. *Brown*, No. 07-35266 (9th Cir. filed Nov. 15, 2007), at 25. See *Auer*,

519 U.S. at 462 (that an "interpretation comes to us in the form of a legal brief" does not "make it unworthy of deference"); *Chase Bank USA* v. *McCoy*, 131 S.Ct. 871, 881 (2011).[2]

7. Congress has never interfered with EPA's position of three decades that channeled forest road runoff is not subject to NPDES—including when it adopted stormwater amendments to section 402 in 1987 that provided ample opportunity to address stormwater from forest roads. "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the inter-

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[2] In its first brief to the Ninth Circuit, on which counsel for EPA is listed, the United States argued that the Court lacked jurisdiction over plaintiff's suit because it was a too-late attack on the Silvicultural Rule. The Ninth Circuit initially did not address jurisdiction, but thereafter sought additional briefing on that issue. The United States's brief on jurisdiction (which listed no counsel from EPA) stated that because the court had held that the Silvicultural Rule was ambiguous, the district court had citizen suit jurisdiction. A footnote stated: "neither the rule itself nor EPA statements in the preamble clearly addressed" whether "channeled and collected runoff is included in the term 'natural runoff.' The first time EPA expressed in an official document its interpretation that 'natural runoff' would include runoff that is channeled, ditched or culverted into manmade structures was in its *amicus* brief in this matter." Amicus Br. of the U.S. Responding to the Court's Questions of Oct. 21, 2010, filed Feb. 10, 2011, at 10 n.5. This statement must rest on a narrow conception of "official document" and be narrowly focused on the preamble to the final 1980 rule, for as we demonstrate in this petition, and as the Ninth Circuit's opinion shows, EPA has taken this position for decades in regulatory pronouncements and briefs, not to mention in its day-to-day application of the CWA.

pretation is the one intended by Congress." *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986).

8. In these circumstances, *Chevron* deference is appropriate. EPA's Silvicultural Rule and stormwater regulations are clear, are reasonable interpretations of the statute, and exclude channeled forest road runoff from permitting by definition. EPA had ample authority to interpret the phrase "associated with industrial activity" to exclude forest road runoff. *E.g.*, *Mayo Foundation* v. *United States*, 131 S.Ct. 704, 711 (2011).

Even if the regulations did not provide a "definitive answer" to the question whether a permit is required, "agency interpretation and agency application of the regulation[s]" lead to the same result. *Coeur Alaska*, 129 S.Ct. at 2473. EPA's consistent statements in regulatory materials and briefs, and its consistent practice, stretching over 35 years, is entitled to deference under *Auer* because it not plainly erroneous or inconsistent with the silvicultural or stormwater regulations. 519 U.S. at 461-463. See U.S. Amicus Br., *NEDC* v. *Brown*, No. 07-35266 (9th Cir.), at 24 (arguing for *Chevron* and *Auer* deference).

The Court should grant this petition to restore EPA's long-held and reasonable interpretations of the CWA's text and EPA's own silvicultural and stormwater rules, to which this Court's decisions require deference, and to reverse the Ninth Circuit's extraordinary decision that EPA *must* interpret "associated with industrial activity" to encompass channeled runoff from forest roads.

B. The Ninth Circuit's Ruling Conflicts With Decisions Of Other Circuits.

Other courts of appeals have ruled that NPDES permits are not required in circumstances like those at issue here. In *Newton County Wildlife Association* v. *Rogers*, 141 F.3d 803, 810 (8th Cir. 1998), the Eighth Circuit confronted the argument—in the context of a suit by environmental groups against the U.S. Forest Service to prevent timber sales in the Ozark National Forest—that the Service "failed to obtain necessary NPDES" permits for "discharges of pollutants that will accompany logging and road construction under the timber sales."

Just as Oregon requires construction of drainage systems as BMPs, it was "undisputed" in *Newton County* that "the logging roads that the Forest Service designed, engineered, staked and required the [timber] purchasers to construct" include "'culverts and road-side ditches." Reply Br. of Appellants, *Newton County Wildlife Ass'n* v. *Rogers*, No. 97-1852 (8th Cir. filed Oct. 14, 1997), at 30. Plaintiffs argued that these "culverts and other discrete sources and conveyances" were point sources requiring permits; that EPA's Silvicultural Rule "says nothing about silvicultural *point* sources such as culverts"; and that the district court's ruling that no permit was required "is contrary both to the plain language of the regulation and to the purposes of the statute." Br. of Appellants, filed July 9, 1997, at 42-43; see Reply Br., *supra*, at 29-30 ("culverts" and "road-side drainage ditches" are "point sources subject to NPDES," "regardless whether these improvements are constructed for a 'logging road'").

The Eighth Circuit rejected these arguments as "without merit." 141 F.3d at 810. Judge Loken ex-

plained for a unanimous court that "EPA regulations do not include the logging and road building activities cited by the Wildlife Association in the narrow list of silvicultural activities that are point sources requiring NPDES permits." *Ibid.* Thus—in direct conflict with the Ninth Circuit—the Eighth Circuit deferred to EPA's distinction in the Silvicultural Rule between a narrowly defined set of point source discharges from silviculture that require permits, and other discharges, including those from logging roads, that do not require permits. In the Eighth Circuit, the forest road runoff at issue here would not be subject to NPDES.

The Ninth Circuit's decision conflicts too with *Conservation Law Foundation* v. *Hannaford Bros. Co.*, 327 F.Supp.2d 325 (D. Vt. 2004), aff'd, 139 F. App'x 3381 (2d Cir. 2005) ("*CLF*"). There, the district court rejected plaintiff's argument that a permit was required for a commercial property's "storm drain and pipe"—a collection system that carried stormwater runoff to a brook that emptied to navigable waters. 327 F.Supp.2d at 326. The court "assumed" the drain and pipe were a point source. *Ibid.* But in contradiction to the Ninth Circuit here, it rejected the contention that "all permit-less stormwater discharges are prohibited" by the Act "even though neither EPA" nor State regulators required a permit. *Id.* at 330, 333; see also *id.* at 330 (the Act "cannot be interpreted to require NPDES permits for all stormwater discharges notwithstanding [EPA's] regulations"). The Second Circuit summarily affirmed that ruling "[f]or substantially the reasons stated by the district court." 139 F. App'x at 338.

The court recognized in *CLF* that Congress "grant[ed] EPA discretion to determine that certain

stormwater discharges require regulation while others do not," and that "EPA is not mandated to control all stormwater discharges." 327 F.Supp.2d at 330. The Ninth Circuit, by contrast, gutted EPA's discretion by overriding EPA's regulation specifying that forest road runoff is not regulated as runoff "associated with industrial activity" under Phase I, and by overriding EPA's decision not to require NPDES permits for such runoff under Phase II. Applying the district court's reasoning in *CLF*—which the Second Circuit deemed worthy of summary affirmance—would lead to the conclusion that the forest roads at issue in this case do not require NPDES permits.

The Eleventh Circuit, addressing the agricultural exemption, reached the same result. In *Fishermen Against the Destruction of the Environment* v. *Closter Farms*, plaintiff contended that Closter Farms required an NPDES permit for a drainage system that channeled precipitation runoff from agricultural lands then pumped it into a lake. 300 F.3d 1294 (11th Cir. 2002). Observing that the "CWA specifically exempts 'agricultural stormwater discharges * * *' from the definition of a point source," the Eleventh Circuit held that no permit was required. *Id.* at 1297. By contrast to the Ninth Circuit here, the Eleventh Circuit held that "[t]he fact that the stormwater is pumped into Lake Okeechobee rather than flowing naturally into the lake does not remove it from the exemption. Nothing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow." *Ibid.*

The confusion on display in the Ninth Circuit's own decisions casts further doubt on its ruling. Here, the Ninth Circuit commanded EPA to permit collected runoff from forest roads as Phase I stormwater

"associated with industrial activity." But in *EDC*, 344 F.3d at 862, 879, the Ninth Circuit held that EPA had not adequately explained its decision to not require NPDES permits for forest roads *under Phase II*, remanding "so that EPA may consider in an appropriate proceeding the Environmental Petitoners' contention that § 402(p)(6) requires EPA to regulate forest roads." As EPA explained below, "[o]bviously, if forestry roads were already covered by Phase I, this remand would have been unnecessary." U.S. Amicus Br., No. 3:06-CV-01270, *NEDC* v. *Brown* (D. Or. filed Dec. 6, 2006), at 27, App., *infra*, 127a. Other Ninth Circuit rulings display similar inconsistency. See *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d 1181, 1185-1186 (9th Cir. 2002) (holding aerial spraying of pesticides "directly into rivers" from a "point source" requires NPDES permit, but distinguishing that activity from "silvicultural pest control activities from which there is natural runoff"); *id.* at 1184 ("the most common example of nonpoint source pollution is the residue left on roadways by automobiles"); *Association to Protect Hammersley, Eld & Totten Inlets* v. *Taylor Resources, Inc.*, 299 F.3d 1007, 1018-1019 (9th Cir. 2002) (upholding EPA regulation defining certain "concentrated aquatic animal production facilities" as nonpoint sources, 40 C.F.R. § 122.24(a), though rafts housing mussel farms were "vessels" included in the statutory definition of a point source; "To hold that these facilities are * * * point sources under the statutory definition would render EPA's criteria [for permitting] superfluous and undermine the agency's interpretation of the [CWA]").

C. The Ninth Circuit's Errors On The Merits Led It To Err In Finding Subject Matter Jurisdiction.

Because of errors it made in interpreting the Silvicultural Rule and stormwater amendments and rules, the Ninth Circuit also erred in exercising subject matter jurisdiction. As the United States and petitioners argued below, this suit is properly viewed as a direct challenge to EPA's rules. It does not allege a violation of an "effluent standard or limitation" under 33 U.S.C. § 1365(a). It therefore should have been filed within 120 days of the rules' promulgations, and filed in a court of appeals in the first instance—neither of which requirements were met. 33 U.S.C. § 1369(b)(1); see also *id.* § 1369(b)(2) ("Action of the Administrator with respect to which review could have been obtained under [§ 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement").

Plaintiff's challenge to the Silvicultural Rule should have been brought within 120 days of the Rule's last promulgation in 1980, in a court of appeals, because it was clear at that time that the Rule excluded channeled runoff from NPDES permitting. And because EPA excluded this runoff defined in the Silvicultural Rule from the scope of its Phase I regulations, it has been clear since those regulations were promulgated in 1990 that channeled forest road runoff is not a stormwater discharge associated with industrial activity.

The Ninth Circuit exercised jurisdiction because it held that the Silvicultural Rule is ambiguous and that the United States resolved that ambiguity for the first time in this lawsuit. *Supra*, p. 23 & n.2; see 33 U.S.C. § 1369(b)(1) (allowing citizen suit after 120

days when "based solely on grounds which arose after such 120th day"). But EPA's position has been clear for decades. A court may not disregard EPA's regulations and rule interpretations, invent ambiguity where none exists, and thereby resurrect a woefully untimely rule challenge. To allow the Ninth Circuit to do so here would destroy the repose Congress granted in Section 1369(b)(1) and bring uncertainty to every longstanding EPA regulation. This serious error too warrants this Court's review.

II. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE AND IS RIPE FOR THIS COURT'S REVIEW.

Left undisturbed the Ninth Circuit's decision threatens economic and regulatory havoc. As Senator Ron Wyden stated, "[i]f this decision is allowed to stand, every use of forest roads will require permitting and will therefore be subject to challenge by citizen lawsuits," which will "overburden landowners and managers in the Ninth Circuit states by adding significant compliance and permitting costs," and "create an opportunity for administrative appeal and litigation every time a permit is approved." 157 Cong. Rec. S4611 (daily ed. July 14, 2011). That would undermine logging operations and "deny States the use of their forests which they depend on to pay for schools and services, while significantly depressing the investment required to sustain private forestry." *Ibid.* Furthermore, the ruling upsets the balance of responsibilities between the States and the federal government, and it interferes with good environmental stewardship.

1. The Ninth Circuit's decision severely impacts owners of public and private forest roads throughout the west and Alaska and Hawaii. NEDC alleges that

there are "hundreds" of locations in Oregon State Forests alone that require permits. First Am. Cmplt. ¶ 6. Nationwide, the U.S Forest Service—an agency within the Department of Agriculture—has jurisdiction over 193 million acres of forestland and 378,000 miles of roads and predicts that the Ninth Circuit's ruling could require it to obtain up to 400,000 permits. U.S. Forest Service, *Implications of Decision in NEDC v. Brown to Silvicultural Activities on National Forest System Land*, Doc. 1570-1, at 3 (Sept. 7, 2010). Millions of acres of state-owned forests throughout the Ninth Circuit will also be affected. States own 75 million acres of forestland nationwide, and in Alaska and Hawaii fully 20 percent of forestlands are state owned. W. Brad Smith *et al., Forest Resources of the U.S., 2007*, at 19-20, available at http://www.fs.fed.us/nrs/pubs/gtr/gtr_wo78.pdf.

The decision's effect on the forest products industry would be severe. Private forests provide 2.5 million jobs and $87 billion in wages to American families.[3] Under the Ninth Circuit's ruling, roads servicing the Nation's 423 million acres of privately owned forestland would require countless permits. See Smith, *supra*, at 12.

The burden of NPDES permitting is substantial. Obtaining a permit involves a labyrinthine application process that includes public hearings and comments, extensive water sampling and testing, effluent limitations, strict technological standards, exten-

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[3] Statement of David P. Tenny, President and CEO, National Alliance of Forest Owners, Before the House Committee on Oversight and Government Reform, Subcomm. on Regulatory Affairs, *Assessing the Cumulative Impact of Regulation on U.S. Manufacturers* (Mar. 9, 2011).

sive monitoring, and the treatment of pollutants. See EPA, *NPDES Permit Writers Manual*, http://www.epa.gov/npdes/pubs/pwm_2010.pdf. And opportunities abound for litigation about the propriety of a permit and compliance once it is issued.

Regulators and businesses already face a significant backlog of permit renewals. NPDES permits must be renewed at least every five years. As of December 2009, only 80% of major and 84% of minor facilities held current permits. See http://www.epa.gov/npdes/pubs/grade.pdf; www.epa.gov/npdes/pubs/grade_minor.pdf. Every year, thousands of facilities must go through the renewal process, and new facilities must be permitted. Adding a new permit requirement for ditches and culverts on millions of miles of forest roads will overwhelm the NPDES program at a time of tightening constraints on agency spending and challenging economic times for forest owners and producers.

Contrary to the Ninth Circuit's suggestion, general permits offer no solution. General permits still impose effluent limitations, technological standards, costly treatment, monitoring, and sampling. See EPA Office of Water, *General Permit Program Guidance* 4 (1988). Establishing a general permit through rulemaking often takes years, to determine that the point sources are substantially similar and require similar effluent limitations and monitoring. And general permits are themselves targets of administrative and judicial challenge: the propriety of virtually every new general permit is litigated. See, *e.g.*, *Waterkeeper Alliance* v. *EPA*, 399 F.3d 486, 498-506 (2d Cir. 2005) (sustaining challenges to general permit for concentrated animal feeding operations); Jeffrey M. Jaba, *Generally Illegal: NPDES General*

Permits Under the Clean Water Act, 31 HARV. ENVT'L L. REV. 409, 461 & n.254 (2007) (identifying "growing numbers of citizen suits").

Under these circumstances, the legal uncertainty from the Circuits' conflicting holdings and the Ninth Circuit's upending of longstanding EPA regulations is intolerable. It is exacerbated by CWA's substantial criminal and civil penalties. Violations of the CWA carry fines up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). And the citizen suit mechanism ensures endless civil suits to require NPDES permits and extract civil penalties. *Id.* § 1365(a). See, *e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F.Supp.2d 41 (N.D.N.Y. 2003) (citizen suit resulting in $5.7 million penalty).

2. The Ninth Circuit's decision unsettles the balance of environmental responsibilities between the States and the federal government. Relying on EPA's consistent position defining forest road runoff as a nonpoint source to be regulated by the States, States have long-established silvicultural regulations and BMPs that protect the Nation's waters. Like Oregon, many control channeling of forest road runoff.[4] Congress understood that channeling would be part of state nonpoint source regulation. See S. Rep. 99-50 (S. 1128), at 35-36 (May 14, 1985), reprinted in 2 Leg. Hist. of Water Quality Act of 1987, 1420, 1456 ("best management practices" to "reduc[e] runoff" from "silvicultural areas" would include "careful road

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[4] *E.g.*, Schilling, *Compendium of Forestry Best Management Practices*, *supra*, at 15-16 (Southeastern States), 48 (Alaska), 76 (Utah), 83-84 (Washington)

placement, culverting, [and] grassing of abandoned roads").

The Ninth Circuit's ruling eviscerates the foundation for nonpoint source regulations by the States and undermines their viability. As such, it improperly "alters the federal-state framework" by commanding "encroachment upon a traditional state power." *SWANCC* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001); see 33 U.S.C. § 1251(b); *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality opinion).

3. The Ninth Circuit's ruling is poor environmental policy. EPA has explained that stormwater runoff from forest roads is best addressed through State regulations, not NPDES permitting. *E.g.*, 41 Fed. Reg. at 6282 (precipitation runoff "is more effectively controlled by the use of planning and management techniques"); 40 Fed. Reg. at 56932 ("most rainfall runoff is more properly regulated under Section 208," "whether or not the rainfall happens to collect before following into navigable waters"). The Ninth Circuit offered no reason to doubt the expert agency's long-held assessment.

The Ninth Circuit's ruling creates perverse incentives. It makes whether costly permitting is required turn on whether runoff is collected. Accordingly, states will "be deterred from using ditches and culverts to manage silvicultural runoff," which could "result in an increase in the amount of road sediment deposited into the waters of the state by runoff." Br. of State Defs., No. 07-35266, at 22. As the State defendants explained, "Congress did not intend to require NPDES permits for silvicultural runoff simply because" the BMPs used "happen to involve ditches and culverts." *Id.* at 18-20. Requiring NPDES per-

mits for these ditches and culverts would "subvert [the CWA's] regulatory scheme, and deplete the tools available to the states to manage water pollution." *Id.* at 27.

4. The Ninth Circuit's ruling conflicts with other Circuits' holdings, interprets EPA regulations in a manner EPA never intended, sows confusion over the regulation of hundreds of millions of acres of forests, and jeopardizes American jobs that depend on the forest products industry. It disrupts the settled division of responsibilities between the federal government and States and is environmentally counterproductive. And it subverts Congress's design regarding the procedures to be followed to challenge an EPA rule. By rejecting en banc review, the Ninth Circuit showed it will not reconsider its holding. No further percolation is necessary, or tolerable as a practical matter given the vast reach of the Ninth Circuit's ruling over American forests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2011

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07–35266.

Northwest Environmental Defense Center, Plaintiff–Appellant,

and

Oregon Forest Industry Council; American Forest & Paper Association, Intervenors,

v.

Marvin Brown, Oregon State Forester, in his official capacity; et al., Defendants–Appellees.

Appeal from the United States District Court for the District of Oregon, Garr M. King, District Judge, Presiding. D.C. No. CV–06–01270–GMK.

Argued and Submitted Nov. 19, 2008.
Filed May 17, 2011.

Before: WILLIAM A. FLETCHER and RAYMOND C. FISHER, Circuit Judges, and CHARLES R. BREYER[1] District Judge.

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[1] The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

ORDER

This court's opinion filed August 17, 2010, and reported at 617 F.3d 1176, is withdrawn, and is replaced by the attached Opinion.

With the filing of the new opinion, the panel has voted unanimously to deny the petitions for rehearing. Judges Fletcher and Fisher have voted to deny the petitions for rehearing en banc, and Judge Breyer so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc, filed October 5, 2010, are DENIED.

No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

W. FLETCHER, Circuit Judge:

Northwest Environmental Defense Center ("NEDC") brings suit against the Oregon State Forester and members of the Oregon Board of Forestry in their official capacities (collectively, "State Defendants") and against various timber companies ("Timber Defendants," and collectively with State Defendants, "Defendants"). NEDC contends that Defendants have violated the Clean Water Act ("CWA") and its implementing regulations by not obtaining permits from the Environmental Protection Agency ("EPA") for stormwater—largely rainwater—runoff that flows from logging roads into systems of ditches, culverts, and channels and is then discharged into

forest streams and rivers. NEDC contends that these discharges are from "point sources" within the meaning of the CWA and that they therefore require permits under the National Pollutant Discharge Elimination System ("NPDES").

The district court concluded that the discharges are exempted from the NPDES permitting process by the Silvicultural Rule, 40 C.F.R. § 122.27, promulgated under the CWA to regulate discharges associated with silvicultural activity. The district court did not reach the question whether the discharges are exempted by amendments to the CWA made in 1987. We reach both questions and conclude that the discharges require NPDES permits.

I. Background

NEDC contends that discharges from systems of ditches, culverts, and channels that receive stormwater runoff from two logging roads in the Tillamook State Forest in Oregon are point source discharges under the CWA. The roads are the Trask River Road, which runs parallel to the South Fork Trask River, and the Sam Downs Road, which runs parallel to the Little South Fork of the Kilchis River. The roads are owned by the Oregon Department of Forestry and the Oregon Board of Forestry. They are primarily used by the Timber Defendants to gain access to logging sites and to haul timber out of the forest. The Timber Defendants use the roads pursuant to timber sales contracts with the State of Oregon. These contracts designate specific routes for timber hauling and require that the Timber Defendants maintain the roads and their associated stormwater collection systems.

Both of the logging roads were designed and constructed with systems of ditches, culverts, and channels that collect and convey stormwater runoff. For most of their length, the roads are graded so that water runs off the road into ditches on the uphill side of the roads. There are several ways these ditches then deliver water into the adjacent rivers. At intervals, the ditches empty into "cross-drain" culverts that cross under the roads. Where the roads are close to the rivers, these culverts deliver the collected stormwater into the rivers. Where the roads are at some distance from the rivers, the roadside ditches connect to culverts under the roads that deliver the collected stormwater into channels, and these channels then discharge the stormwater into the rivers. When tributary streams cross under the roads, the roadside ditches deliver the collected stormwater into these streams. These streams then carry the collected stormwater to the rivers.

The stormwater runoff that flows off the roads and through these collection systems deposits large amounts of sediment into streams and rivers. This sediment adversely affects fish—in particular, salmon and trout—by smothering eggs, reducing oxygen levels, interfering with feeding, and burying insects that provide food.

Timber hauling on the logging roads is a major source of the sediment that flows through the stormwater collection systems. Logging trucks passing over the roads grind up the gravel and dirt on the surface of the road. Small rocks, sand, and dirt are then washed into the collection system and discharged directly into the streams and rivers. NEDC alleged in its complaint that it sampled stormwater discharges at six points along the Trask River Road

and five points along the Sam Downs Road where the Defendants use ditches, culverts, and channels to collect and then discharge stormwater runoff. Each sample contained significant amounts of sediment.

None of the Defendants has sought or received NPDES permits for these discharges into the streams and rivers. NEDC brought suit under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a), which provides that "any citizen may commence a civil action on his own behalf ... against any person" alleged to be in violation of the CWA. NEDC claims that Defendants have violated the CWA by not obtaining NPDES permits. On March 1, 2007, the district court dismissed NEDC's complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. NEDC has timely appealed.

II. Subject Matter Jurisdiction

In the original version of our opinion, we did not discuss our subject matter jurisdiction. None of the parties to the suit had raised an objection to subject matter jurisdiction. In an amicus brief, however, the United States had contended that the challenged Silvicultural Rule was unambiguous and that, as a consequence, citizen-suit jurisdiction under 33 U.S.C. § 1365(a) was improper. Instead, the United States had argued, the suit should have been brought under 33 U.S.C. § 1369(b). A defect in subject matter jurisdiction is, of course, not waivable.

Without discussing subject matter jurisdiction, we held on the merits that the Silvicultural Rule is ambiguous. After we published our opinion, one of our colleagues asked us to discuss our subject matter jurisdiction. We asked for supplemental briefing. In

light of our holding that the Rule is ambiguous, the United States now concedes, in a second amicus brief, that we have subject matter jurisdiction under § 1365(a). We agree with the United States.

A citizen can bring a suit under § 1365(a) against any person, including the United States, who is alleged to be in violation of "an effluent standard or limitation" under the CWA. A citizen suit may be brought against a person or entity illegally discharging a pollutant into covered waters without an NPDES permit. *Id.* at § 1365(f)(6). Suits under § 1365, however, are limited by the CWA's judicial review mechanism at § 1369(b). Section 1369(b) provides for the review of various actions of the EPA Administrator, including the promulgation of effluent standards, prohibitions, or limitations, as soon as those actions take place. *Id.* at § 1369(b)(1). Such suits must be brought within 120 days from the date of the Administrator's "determination, approval, promulgation, issuance or denial," unless the basis for the suit arose more than 120 days after the agency action. *Id.* Any action that could have been brought under § 1369(b) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id.* at § 1369(b)(2).

The basis for NEDC's challenge to the Silvicultural Rule arose more than 120 days after the promulgation of the Rule. As we discuss in greater detail below, the Silvicultural Rule is susceptible to two different readings. Under one reading, the Rule does not require permits for silviculture stormwater runoff. Under this reading, the Rule is inconsistent with the CWA and hence invalid. Under the other reading, the Rule requires permits for the runoff and is consistent with the CWA. The United States

adopted the first reading of the Silvicultural Rule for the first time in its initial amicus brief in this case. Until the United States filed that brief, there was no way for the public to know which reading of the Silvicultural Rule it would adopt. As the government states in its second amicus brief to us,

> At the time an ambiguous regulation is promulgated ... the public cannot reasonably be expected to challenge potential regulatory interpretations that are textually plausible but that the agency has not contemporaneously offered and may never adopt. Indeed, a rule encouraging such challenges to hypothetical interpretations would likely only foster unnecessary litigation.

Because the Silvicultural Rule was subject to two readings, only one of which renders the Rule invalid, and because the government first adopted its interpretation of the Rule in its initial amicus brief in this case, this case comes within the exception in § 1369(b)(1) for suits based on grounds arising after the 120–day filing window. Section 1369(b) therefore does not bar a citizen suit challenging EPA's Silvicultural Rule interpretation first adopted in its initial amicus brief in this case. We thus have subject matter jurisdiction under 33 U.S.C. § 1365(a).

III. Standard of Review

We review de novo a district court's dismissal under Rule 12(b)(6). *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We accept as true all of NEDC's allegations of material facts and we construe them in the light most favorable to NEDC. *Id.*

We review de novo the district court's interpretation of the CWA and its implementing regulations.

League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Forsgren, 309 F.3d 1181, 1183 (9th Cir. 2002). We defer to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous, inconsistent with the regulation, or based on an impermissible construction of the governing statute. *Auer v. Robbins*, 519 U.S. 452, 457, 461–62 (1997). We review EPA's interpretations of the CWA under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). At *Chevron* step one, if, employing the "traditional tools of statutory construction," we determine that Congress has directly and unambiguously spoken to the precise question at issue, then the "unambiguously expressed intent of Congress" controls. *Id.* at 843. At *Chevron* step two, if we determine that the statute is "silent or ambiguous with respect to the specific issue," we must determine whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843. An agency interpretation based on a permissible construction of the statute controls. *Id.* at 844.

IV. Discussion

NEDC contends that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then delivered into streams and rivers, is a point source discharge subject to NPDES permitting under the CWA. Defendants, however, contend that the Silvicultural Rule exempts such runoff from the definition of point source discharge, and thus exempts it from the NPDES permitting process. Alternatively, Defendants contend that the 1987 amendments to the CWA and regulations implementing those amendments exempt such runoff from the definition of

point source discharge and from the permitting process. We discuss, in turn, the definition of point source discharge, the Silvicultural Rule, and the 1987 amendments to the CWA.

A. Definition of Point Source Discharge

In 1972, in the Federal Water Pollution Control Act ("FWPCA"), Congress substantially revised federal law governing clean water. Pub. L. No. 92–500, 86 Stat. 816 (1972). In 1977, the statute was renamed the Clean Water Act ("CWA"). Pub. L. No. 95–217, 91 Stat. 1566 (1977). Congress enacted the FWPCA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by replacing water quality standards with point source effluent limitations. 33 U.S.C. § 1251(a); *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998). Section 301(a) of the Act provides that, subject to certain exceptions, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). One of these exceptions is a point source discharge authorized by a permit granted pursuant to the NPDES system under § 402 of the Act. 33 U.S.C. § 1342. The combined effect of §§ 301(a) and 402 is that "[t]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit." *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003); *see also Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1010 (9th Cir. 2008). "Pollutants" include "rock" and "sand." 33 U.S.C. § 1362(6). Defendants do not contest that sediment discharges from logging roads constitute pollutants within the meaning of the CWA.

"It is well settled that the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987). Section 502(14) of the Act defines "point source" as

> any *discernible, confined and discrete conveyance,* including but not limited to *any pipe, ditch, channel, tunnel, conduit,* well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (emphasis added). The term "nonpoint source" is left undefined.

Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source as defined by § 502(14). As we wrote in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002):

> Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits. The most common example of nonpoint source pollution is the residue left on roadways by automobiles. Small amounts of rubber are worn off of the tires of

> millions of cars and deposited as a thin film on highways; minute particles of copper dust from brake linings are spread across roads and parking lots each time a driver applies the brakes; drips and drabs of oil and gas ubiquitously stain driveways and streets. When it rains, the rubber particles and copper dust and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean.

However, when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a "discernable, confined and discrete conveyance" of pollutants, and there is therefore a discharge from a point source. In other words, runoff is not inherently a nonpoint or point source of pollution. Rather, it is a nonpoint or point source under § 502(14) depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).

Our caselaw has consistently recognized the distinction between nonpoint and point source runoff. In *Natural Resources Defense Council v. California Department of Transportation,* 96 F.3d 420, 421 (9th Cir. 1996), we were asked to enforce an already-issued NPDES permit requiring a state agency using storm drains "to control polluted stormwater runoff from roadways and maintenance yards[.]" In *Natural Resources Defense Council v. EPA* ("*NRDC v. EPA*"), 966 F.2d 1292, 1295 (9th Cir. 1992), we wrote, "This case involves runoff from diffuse sources that even-

tually passes through storm sewer systems and is thus subject to the NPDES permit program." In *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 1984), we explicitly agreed with a decision of the Tenth Circuit, *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979). We wrote:

> The [Tenth Circuit] observed that Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants. Such runoff could not be traced to any identifiable point of discharge. The court concluded that point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by *whether the pollution reaches the water through a confined, discrete conveyance.* Thus, when mining activities release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources.

749 F.2d at 558 (emphasis added) (internal citation omitted). Finally, in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), we wrote: "Storm sewers are established point sources subject to NPDES permitting requirements.... Diffuse runoff, such as rainwater that is *not* channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation." *Id.* at 841, 842 n.8 (emphasis added) (internal citations omitted).

The clarity of the text of § 502(14), as well as our caselaw, would ordinarily make recourse to legislative history unnecessary. The "unambiguously expressed intent of Congress" controls. *Chevron*, 467

U.S. at 842–43. However, because EPA relied on the legislative history of the FWPCA in promulgating the Silvicultural Rule at issue in this case, we recount some of that history as background to our analysis of the Rule.

The FWPCA established "distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources." *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). The Senate Committee elected to impose stringent permitting requirements only on point sources because "[t]here is no effective way as yet, other than land use control, by which you can intercept [nonpoint] runoff and control it in the way that you do a point source. We have not yet developed technology to deal with that kind of a problem." 117 Cong. Rec. 38825 (Nov. 2, 1971) (statement of Sen. Muskie).

The House and Senate committees made clear that the term "point source" was not to be interpreted narrowly. "By the use of the term 'discharge of pollutants' this provision [§ 402] covers any addition of any pollutant to navigable waters from any point source." H.R. Rep. No. 92–911, at 125 (1971). The Senate Committee Report instructed that

> the [EPA] Administrator should not ignore discharges resulting from point sources other than pipelines or similar conduits.... There are many other forms of periodic, though frequent, discharges of pollutants into the water through point sources such as barges, vessels, feedlots, trucks and other conveyances.

S. Rep. No. 92–414, at 51 (1971), 1972 U.S.C.C.A.N. 3668, 3760. Senator Dole explained his understand-

ing of the distinction as it related to the problem of agricultural pollution:

> Most of the problems of agricultural pollution deal with non-point sources. Very simply, a non-point source of pollution is one that does not confine its pollution discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit; thus, a feed-lot would be considered to be a non-point source as would pesticides and fertilizers.

S. Rep. No. 92–414, at 98–99 (1971), 1972 U.S.C.C.A.N. 3668, 3760 (Supplemental Views of Sen. Dole).

Congress did not provide the EPA Administrator with discretion to define the statutory terms. Senator Randolph, the Chairman of the Senate Committee, explained, "We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives [for] administrators to follow." 117 Cong. Rec. 38805 (Nov. 2, 1971). Senator Muskie, another major proponent of the legislation, clarified that EPA would provide "[g]uidance with respect to the identification of 'point sources' and 'nonpoint sources.'" 117 Cong. Rec. 38816 (Nov. 2, 1971). However, "[i]f a man-made drainage, ditch, flushing system or other such device is involved and if measurable waste results and is discharged into water, it is considered a 'point source.'" *Id.*

Congress also sought to require permits for any activity that met the legal definition of "point source," regardless of feasibility concerns. For example, Congressman Roncalio of Wyoming proposed an amendment to exempt irrigated agriculture from the

NPDES permit program because it was "virtually impossible to trace pollutants to specific irrigation lands, making these pollutants a nonpoint source in most cases." 118 Cong. Rec. 10765 (Mar. 29, 1972). Opponents objected that the amendment would exclude large point source polluters simply because the channeled water originally derived from irrigated agriculture. Congressman Waldie explained:

> In California there is a vast irrigation basin that collects all the waste resident of irrigation water in the Central Valley and places it in a drain—the San Luis Draining—and transport[s] it several hundreds of miles and then dumps it into the San Joaquin River which flows into the estuary and then into San Francisco Bay. It is highly polluted water that is being dumped in waters already jeopardized by pollution.
>
> Will the gentleman's amendment establish that as a nonpoint source pollution or will it come under the point source solution discharge?

Id. Congressman Roncalio responded that his amendment would not require permitting for this type of activity—that is, that it would redefine these agricultural point sources as nonpoint source pollution. His amendment was then rejected on the House floor. *See id.*

Congress eventually adopted a statutory exemption for agricultural irrigation in 1977, five years after the passage of the FWPCA. *See* CWA § 402(*l*), 33 U.S.C. § 1342(*l*) ("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agricul-

ture, nor shall the Administrator directly or indirectly, require any State to require such a permit."); CWA § 502(14), 33 U.S.C. § 1362(14) ("This term does not include return flows from irrigated agriculture."). Congress did so to alleviate EPA's burden in having to issue permits for every agricultural point source. "The problems of permitting every discrete source or conduit returning water to the streams from irrigated lands is simply too burdensome to place on the resources of EPA." 123 Cong. Rec. 38956 (Dec. 15, 1977) (statement of Rep. Roberts). Congress did not, however, grant EPA the discretion to exempt agricultural discharges from the general statutory definition of point source discharges. Rather, Congress exempted such discharges by amending the statute. Congress has never granted a similar statutory exemption for silvicultural discharges from the general definition of point source discharges.

Despite the foregoing, Defendants contend that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers, is a nonpoint source discharge. Defendants contend that the Silvicultural Rule exempts such discharges from the definition of point source discharge contained in § 502(14), and therefore from the NPDES permitting system. Alternatively, Defendants contend that the 1987 amendments to the CWA exempted such discharges from the permitting system. We discuss defendants' two contentions in turn.

B. The Silvicultural Rule

1. Adoption of the Rule

In 1973, one year after the passage of the FWPCA, EPA promulgated regulations categorically

exempting several kinds of discharges from the NPDES permit program. Exempted discharges included discharges from storm sewers composed entirely of storm runoff uncontaminated by industrial or commercial activity, discharges from relatively small animal confinement facilities, discharges from silvicultural activities, and irrigation return flow from point sources where the flow was from less than 3000 acres. The exemption for discharges from silvicultural activities provided:

> The following do not require an NPDES permit:
>
> ...
>
> (j) Discharges of pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff from orchards, cultivated crops, pastures, rangelands, and forest lands, except that this exclusion shall not apply to the following:
>
> ...
>
> (5) Discharges from any agricultural or silvicultural activity which have been identified by the Regional Administrator of the Director of the State water pollution control agency or interstate agency as a significant contributor of pollution.

40 C.F.R. § 125.4 (1975). The Natural Resources Defense Council challenged the regulations as inconsistent with the statute. *See Natural Res. Def. Council v. Train*, 396 F. Supp. 1393 (D.D.C. 1975).

EPA defended the challenged regulations on the ground "that the exempted categories of sources are ones which fall within the definition of point source but which are ill-suited for inclusion in a permit pro-

gram." *Id.* at 1395. The district court wrote that EPA has authority to clarify by regulation the definition of nonpoint and point source discharges, but only so long as its regulations comply with the statutory text. *Id.* at 1395–96. In the court's view, the challenged regulations categorically exempted "entire classes of point sources from the NPDES permit requirements." *Id.* at 1396. The court therefore held that the regulations were fatally inconsistent with the definition contained in § 502(14), writing "that the Administrator [of the EPA] cannot lawfully exempt point sources discharging pollutants from regulation under NPDES." *Id.* at 1402.

EPA appealed to the D.C. Circuit. While the appeal was pending, EPA grudgingly promulgated revised regulations. For example, in soliciting public comment on a proposal for a "system for separate agricultural and silvicultural storm sewers" rule in December 1975, EPA wrote:

> In promulgating the [earlier] regulations EPA stated its belief that while some point sources within the excluded categories may be significant contributors of pollution which should be regulated consistent with the purposes of the FWPCA, it would be administratively difficult if not impossible, given Federal and State resource levels, to issue individual permits to all such point sources.... Essentially, these [earlier] regulations providing for exemptions were based on EPA's view (*a view which it continues to maintain is correct*) that most sources within the exempted categories present runoff-related problems not susceptible to the conventional NPDES permit program including

> effluent limitations. *EPA's position was and continues to be* that most rainfall runoff is more properly regulated under section 208 of the FWPCA [which does not require NPDES permits], whether or not the rainfall happens to collect before flowing into navigable waters. Agricultural and silvicultural runoff, as well as runoff from city streets, frequently flows into ditches or is collected in pipes before discharging into streams. EPA contends that most of these sources are nonpoint in nature and should not be covered by the NPDES permit program.

40 Fed. Reg. 56932 (Dec. 5, 1975) (emphasis added).

Two months later, in February 1976, EPA proposed a revised Silvicultural Rule and solicited public comment. EPA wrote,

> [T]he Agency has carefully examined the relationship between the NPDES permit program (which is designed to control and eliminate discharges of pollutants from discrete point sources) and water pollution from silvicultural activities (which tends to result from precipitation events). It has been determined that most water pollution related to silvicultural activities is nonpoint in nature.

41 Fed. Reg. 6282 (Feb. 12, 1976).

EPA continued:

> Those silvicultural activities which are specified in the regulations (rock crushing, gravel washing, log sorting and log storage facilities), and are thus point sources, are subject to the NPDES permit program. Only

> those silvicultural activities that, as a result of controlled water used by a person, discharge pollutants through a discernible, confined and discrete conveyance into navigable waters are required to obtain a § 402 pollution discharge permit.

Id. This passage provides EPA's central criterion for distinguishing between silvicultural point and nonpoint sources. EPA proposed to characterize discharges of pollutants through a discernible, confined and discrete conveyance as point source discharges only when they were "a result of controlled water used by a person." Under this criterion, the proposed rule named as point source discharges only those related to "rock crushing, gravel washing, log sorting, [and] log storage facilities." *Id.* 6283 (Proposed Rule); 41 Fed. Reg. 24711 (Jun. 18, 1976) (Final Rule); 40 C.F.R. § 124.85 (1976). Any other silvicultural discharge of pollutants, even if made through a discernible, confined and discrete conveyance, was considered a nonpoint source of pollutants. In effect, this meant that any natural runoff containing pollutants was not a point source, even if the runoff was channeled and controlled through a "discernible, confined and discrete conveyance" and then discharged into navigable waters.

In its "response to comments" accompanying the final version, EPA provided more general criteria by which to distinguish nonpoint from point sources of pollution. It wrote:

> Basically, nonpoint sources of water pollution are identified by three characteristics:

> (i) The pollutants discharged are induced by natural processes, including precipitation, seepage, percollation [sic], and runoff;
>
> (ii) The pollutants discharged are not traceable to any discrete or identifiable facility; and
>
> (iii) The pollutants discharged are better controlled through the utilization of best management practices, including process and planning techniques.
>
> In contrast to these criteria identifying nonpoint sources, point sources of water pollution are generally characterized by discrete and confined conveyances from which discharges of pollutants into navigable waters can be controlled by effluent limitations. It is these point sources in the silviculture category which are most amenable to control through the NPDES permit program.

41 Fed. Reg. 24710 (Jun. 18, 1976). EPA specifically noted that the single criterion for point sources—resulting from "controlled water used by a person"—was underinclusive. EPA pointed out that some point source discharges take place "regardless of any [prior] contact with water," such as discharges of wood chips and bark directly into navigable water. *Id.*

However, the actual text of the final version of the Silvicultural Rule was little changed from the version proposed in February. *See* 41 Fed. Reg. 24711 (Jun. 18, 1976). The revised Rule provided in pertinent part:

> Silvicultural activities.

(a) Definitions. For the purpose of this section:

(1) The term "silvicultural point source" means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters of the United States.

Comment: This term does not include nonpoint source activities inherent to silviculture such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road construction and maintenance from which runoff results from precipitation events.

40 C.F.R. § 124.85 (1976). Even though there was no longer a single criterion for identifying point source discharges, the same four activities were specified as producing point source discharges—rock crushing, gravel washing, log sorting and log storage. *Id.* And even though there were now three general criteria for identifying nonpoint sources, the effect of the Rule was to treat all natural runoff as nonpoint pollution, even if channeled and discharged through a discernible, confined and discrete conveyance.

In comments accompanying the proposed Silvicultural Rule in February 1976, EPA provided, in concise form, its justification for the Rule. It wrote:

Technically, a point source is defined as a "discernible, confined and discrete conveyance, including but not limited to any

> pipe, ditch [or] channel * * * " (§ 502(14) of the FWPCA) and includes all such conveyances. However, a proper interpretation of the FWPCA as explained in the legislative history and supported by the [district] court in *NRDC v. Train* is that not every "ditch, water bar or culvert" is "means [sic] to be a point source under the Act [FWCPA]." It is evident, therefore, that ditches, pipes and drains that serve only to channel, direct, and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program.

41 Fed. Reg. 6282 (Feb. 12, 1976). A sentence-by-sentence analysis shows the weakness of EPA's justification.

In the first sentence, EPA wrote that "[t]echnically, a point source is defined as a 'confined and discrete conveyance, including but not limited to any pipe, ditch, [or] channel.'" The words quoted by EPA in this sentence were a direct (though partial) quotation of the statutory definition of "point source" contained in § 502(14) of the FWPCA. EPA's choice of the word "technically" is somewhat odd and even misleading; perhaps EPA hoped that the word would diminish the force of the statutory definition. But whatever its motive, EPA would have been more accurate if it had written "textually" instead of "technically."

In the second sentence, EPA wrote that "a proper interpretation of the FWCPA as explained in the legislative history and supported by the court in *NRDC v. Train* is that not every 'ditch, water bar or culvert' is 'mean[t] to be a point source under the Act [FWCPA].'" EPA was putting words into the district

court's mouth. The district court did not hold that "not every 'ditch, water bar or culvert' is 'meant to be a point source.'" Rather, the court wrote only that the plaintiff in the case, NRDC, had not made that argument. *See Train,* 396 F. Supp. at 1401 ("NRDC does not contend that every farm ditch, water bar, or culvert on a logging road is properly meant to be a point source under the Act."). Further, and more important, everyone understands that a "ditch, water bar or culvert" *that does not discharge into navigable waters* is not a point source. But the regulation does not exempt only such ditches, water bars or culverts. Instead, it categorically exempts collected runoff from silviculture, whether or not there is a discharge into navigable waters.

Finally, in the last sentence EPA wrote, "It is evident, therefore, that ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject to the § 402 permit program." The text of § 502(14), quoted in the first sentence of the paragraph, is flatly inconsistent with this statement. Under § 502(14), a pollutant comes from a point source if it is collected and discharged through ditches, pipes, channels, and similar conveyances. Section 502(14) says nothing, either explicitly or implicitly, about the source of the water contained in the discharge. Further, even though not every "ditch, water bar, or culvert" is a point source within the meaning of the statute, it hardly follows that a system of ditches, pipes and channels that collects "controlled water used by a person" and discharges it into a river is a point source, while an identical system that collects and discharges natural precipitation is not.

After EPA promulgated the revised Silvicultural Rule, the Court of Appeals for the D.C. Circuit affirmed the district court's disapproval of the 1973 regulations, including the original Silvicultural Rule. *Natural Res. Def. Council v. Costle,* 568 F.2d 1369 (D.C.Cir.1977). The court did not review the revised Silvicultural Rule promulgated in 1976. The court held that EPA did not have the authority categorically to exempt point source discharges. It wrote:

> Under the EPA's interpretation the Administrator would have broad discretion to exempt large classes of point sources from any or all requirements of the FWPCA. This is a result that the legislators did not intend. Rather they stressed that the FWPCA was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type.

Id. at 1375.

The court responded to EPA's argument that a literal interpretation of the FWPCA's definition of "point source" "would place unmanageable burdens on the EPA":

> There are innumerable references in the legislative history to the effect that the Act is founded on the "basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful." *Even when infeasibility arguments were squarely raised, the legislature declined to abandon the permit requirement.*

Id. at 1375–76 (emphasis added). The court concluded:

> The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute.

Id. at 1377.

Although the D.C. Circuit did not address the revised Silvicultural Rule in its opinion, its reasoning is no less applicable to the new version of the Rule. The court concluded that EPA does not have the authority to "exempt categories of point sources" from the permitting requirements of § 402. This is so even if EPA contends that the literal terms of the statute would place "unmanageable burdens" on the agency. The FWPCA was a "tough law" that EPA was not at liberty to ignore.

2. The Revised Silvicultural Rule

The current text of the revised version of the Silvicultural Rule is different in only minor respects from the version promulgated in 1976. In pertinent part, the current version provides:

> (b) *Definitions.* (1) *"Silvicultural point source"* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, refore-

> station and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.

40 C.F.R. § 122.27.

The text of the CWA distinguishes between point and nonpoint sources depending on whether the pollutant is channeled and controlled through a "discernible, confined and discrete conveyance." CWA § 502(14), 33 U.S.C. § 1362(14). The Silvicultural Rule, by contrast, categorically distinguishes between the two types of discharges depending on the source of the pollutant. Under the Rule, "silvicultural point source" discharges are those discharged through "discernible, confined and discrete conveyance[s]," but only when they are direct discharges of wood chips, bark, and the like, or discharges resulting from "controlled water used by a person." *See* 41 Fed. Reg. 24710 (Jun. 18, 1976); 41 Fed. Reg. 6282 (Feb. 12, 1976). All other discharges of "natural runoff" are nonpoint sources of pollution, even if such discharges are channeled and controlled through a "discernible, confined and discrete conveyance."

A nonexhaustive list of silvicultural point source discharges under the Rule includes discharges "related to rock crushing, gravel washing, log sorting, [and] log storage facilities." A nonexhaustive list of silvicultural nonpoint sources of pollution under the Rule includes "silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance."

The original Silvicultural Rule, which was struck down by the district court in *Train* and on appeal in *Costle*, categorically exempted all discharges from silvicultural activities. The current Rule categorically exempts all discharges from silvicultural activities resulting from natural runoff. The categorical exemption in the current Rule is somewhat smaller than the exemption in the original Rule, but it is a categorical exemption nonetheless. Indeed, in a later rulemaking proposal EPA specifically characterized it as a categorical exemption. *See* 64 Fed. Reg. 46058, 46077 (Aug. 23, 1999) ("Currently, runoff from [the list of "non-point source silvicultural activities"] is categorically excluded from the NPDES program."). The question before us is whether the categorical exemption from the NPDES permit program in the current Rule is based on a permissible interpretation of § 502(14).

We have dealt with the Silvicultural Rule once before. In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren* ("*Forsgren*"), 309 F.3d 1181 (9th Cir. 2002), several environmental groups sued to enjoin unpermitted aerial spraying of insecticide to combat the Douglas Fir Tussock Moth. Some of the insecticide was sprayed onto the surface of streams. Plaintiffs contended that the aerial spraying was a discharge from a point source requiring an NPDES permit. Relying on the Silvicultural Rule and on two letters and a guidance document from EPA, the Forest Service took the position that the spraying was not a point source discharge, and that a permit was therefore not required. We disagreed with EPA and the Forest Service.

The core of the EPA and Forest Service argument was that "pest ... control" was one of the activities listed in the Silvicultural Rule as not constituting a point source discharge. We wrote:

> The Forest Service's argument fails because the statute itself is clear and unambiguous. The statutory definition of point source, "any discernible, confined and discrete conveyance, including but not limited to any ... vessel," 33 U.S.C. § 1362(14), clearly encompasses an aircraft equipped with tanks spraying pesticide from mechanical sprayers directly over covered waters. The Forest Service cannot contravene the will of Congress through its reading of administrative regulations.

Forsgren, 309 F.3d at 1185–86.

We pointed out that the Rule characterized a pest control discharge as nonpoint only when it was "silvicultural pest control *from which there is natural runoff*." *Id.* Dat 1186 (emphasis in original). If pest control activity resulted in natural runoff, that runoff was not a point source discharge under § 502(14). But it was undisputed in *Forsgren* that aerial spraying of pesticide into streams was not "natural runoff." We had no occasion to rule on, and did not discuss, whether silvicultural activities from which there is natural runoff *that is channeled, controlled, and discharged through a "discernible, confined and discrete conveyance"* is a point source under § 502(14).

We emphatically "reject[ed] the Forest Service's argument that the EPA has the authority to 'refine' the definitions of point source and nonpoint source

pollution in a way that contravenes the clear intent of Congress as expressed in the statute." *Id.* at 1190. We wrote:

> We agree with the D.C. Circuit that the EPA has some power to define point source and nonpoint source pollution where there is room for reasonable interpretation of the statutory definition. However, the EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by "defining" it as a non-point source. Allowing the EPA to contravene the intent of Congress, by simply substituting the word "define" for the word "exempt," would turn *Costle* on its head.

Id. We now reach the question not reached or discussed in *Forsgren*—whether discharge of natural runoff becomes a point source discharge when it is channeled and controlled through a "discernible, confined and discrete conveyance" in a system of ditches, culverts, and channels. We conclude that it does.

In our view, the answer to the question before us is as clear as the answer to the questions presented in *Costle* and in *Forsgren*. The CWA prohibits "the discharge of any pollutant by any person" without an NPDES permit. 33 U.S.C. § 1311(a). The term "discharge of a pollutant" means "*any* addition of any pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(A) (emphasis added). A "point source" is

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, con-

> centrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14). The definition in no way depends on the manner in which the pollutant arrives at the "discernible, confined and discrete conveyance." That is, it makes no difference whether the pollutant arrives as the result of "controlled water used by a person" or through natural runoff.

We agree with the analysis of the district court in *Environmental Protection Information Center v. Pacific Lumber Co.* (*"EPIC"*), 2003 WL 25506817 (N.D. Cal. 2003). Relying on *Forsgren*, Judge Patel concluded that stormwater runoff from logging roads that was collected in a system of ditches, culverts, and channels, and then discharged into protected water, was a point source discharge requiring an NPDES permit. After an extensive analysis, the district court wrote:

> The water runoff system this action addresses is an elaborate and extensive one. Blending a variety of drainage methods, the system covers a substantial amount of land and addresses a significant amount of water. Where this runoff system involves "surface drainage[ ] or road construction from which there is natural runoff," section 122.27 [the Silvicultural Rule] may control. But where the system utilizes the kind of conduits and channels embraced by section 502(14), section 122.27 does not control: It cannot control, for one, because section 502(14) of the CWA trumps section 122.27's operation, as EPA may not alter the definition of an existing "point source." And it cannot control, for

> another, because section 122.27's own terms are unsatisfied; once runoff enters a conduit like those listed in section 502(14), the runoff ceases to be the kind of "natural runoff" section 122.27 expressly targets. In this latter context, section 122.27 does not—and cannot—absolve silvicultural businesses of CWA's "point source" requirements.

Id. at *15 (internal citations omitted).

As pointed out by the district court in *EPIC*, there are two possible readings of the Silvicultural Rule. The first reading reflects the intent of EPA in adopting the Rule. Under this reading, the Rule exempts all natural runoff from silvicultural activities such as nursery operations, site preparation, and the other listed activities from the definition of point source, irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into protected water. If the Rule is read in this fashion, it is inconsistent with § 502(14) and is, to that extent, invalid.

The second reading does not reflect the intent of EPA, but would allow us to construe the Rule to be consistent with the statute. Under this reading, the Rule exempts natural runoff from silvicultural activities such as those listed, but only as long as the "natural runoff" remains natural. That is, the exemption ceases to exist as soon as the natural runoff is channeled and controlled in some systematic way through a "discernible, confined and discrete conveyance" and discharged into the waters of the United States.

Under either reading, we hold that the Silvicultural Rule does not exempt from the definition of

point source discharge under § 512(14) stormwater runoff from logging roads that is collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers.

C. 1987 Amendments to the CWA

Defendants contend in the alternative that even if the discharges from a system of ditches, culverts, and channels are point source discharges within the meaning of § 502(14), and even if the Silvicultural Rule does not exempt such discharges from § 502(14), the discharges are nonetheless exempt from the permitting process because of the 1987 amendments to the CWA. Defendants made this contention in the district court, but that court did not decide the question.

We can affirm the decision of the district court on any ground supported by the record, even one not relied on by that court. *Thompson v. Paul*, 547 F.3d 1055, 1058–59 (9th Cir.2008). Defendants urge us, if we hold that the Silvicultural Rule does not exempt the discharges, to affirm the district court based on the 1987 amendments. No factual development is necessary given that the district court dismissed under Rule 12(b)(6). The parties have briefed the question in this court. We therefore reach the question.

1. Congressional Approval or Acquiescence

As a threshold matter, we consider whether, in adopting the 1987 amendments to the CWA, Congress *sub silentio* approved of, or acquiesced in, the Silvicultural Rule. We conclude that Congress did not.

In some instances, congressional re-enactment of statutes can be persuasive evidence of approval of

longstanding administrative regulations promulgated under that statute. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974), the Court wrote, "[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting and paraphrasing *Bell Aerospace*). But this case is very different from *Bell Aerospace* and *Schor*. First, in both *Bell Aerospace* and *Schor*, the legislative histories made clear that when Congress re-enacted the statutes at issue it was well aware of the existing administrative interpretation of the statutes. Here, by contrast, there is no indication that Congress was aware of the Silvicultural Rule when it adopted the 1987 amendments. There is no mention of, or even allusion to, the Rule anywhere in the legislative history of the amendments. Second, in both *Bell Aerospace* and *Schor*, the relevant portions of the statutes at issue were re-enacted essentially without change. Here, as we explain below, the 1987 amendments fundamentally changed the statutory treatment of stormwater discharges. Third, the language of the original and the re-enacted statutes in both *Bell Aerospace* and *Schor* was readily susceptible to the administrative interpretations of those statutes. Here, by contrast, the relevant statutory language is flatly inconsistent with the Silvicultural Rule.

In other instances, congressional action or inaction can constitute acquiescence in an existing regu-

lation. The Supreme Court has cautioned strongly against finding congressional acquiescence. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001), it wrote, "Although we have recognized congressional acquiescence to administrative interpretations of a statute in some circumstances, we have done so with extreme care." After discussing a case in which there had been congressional hearings on the precise issue, and in which thirteen bills had been introduced in unsuccessful attempts to overturn the regulation, the Court wrote, "Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id.* at 169–70, n.5. Here, there is no evidence whatsoever of congressional acquiescence in the Silvicultural Rule, let alone "overwhelming evidence."

2. The 1987 Stormwater Amendments

Congress amended the CWA in 1987 to deal specifically with stormwater discharges. Pub. L. No. 100–4, 101 Stat. 7 (1987). Congress added § 402(p) to the CWA, establishing a "phased and tiered approach" to NPDES permitting of stormwater discharges. *See* 55 Fed. Reg. 47994 (Nov. 16, 1990) (describing 33 U.S.C. § 1342(p)). Section 402(p) fundamentally redesigned the CWA's approach to stormwater discharges.

Under the framework created by the FWPCA in 1972, EPA was required to establish a permitting system for all point source discharges of stormwater. Senator Durenberger explained that the Conference Bill that would become the 1987 amendment focused on stormwater point sources.

> The [FWPCA] of 1972 required all point sources, including stormwater dischargers, to apply for NPDES permits within 180 days of enactment by 1973. Despite this clear directive, EPA has failed to require most stormwater point sources to apply for permits which would control the pollutants in their discharge.

132 Cong. Rec. 32380, 32400 (Oct. 16, 1986). Senator Stafford, the Chairman of the Committee on Environment and Public Works reiterated, "EPA should have developed this [stormwater] program long ago. Unfortunately, it did not." 132 Cong. Rec. 32381 (Oct. 16, 1986).

Congress recognized that EPA's difficulties stemmed in part from the large number of stormwater sources falling within the definition of a point source. *See, e.g.*, 131 Cong. Rec. 19846, 19850 (Jul. 22, 1985) (statement of Rep. Rowland) ("Under existing law, the [EPA] must require [NPDES] permits for anyone who has stormwater runoff on their property. What we are talking about is potentially thousands of permits for churches, schools, residential property, runoff that poses no environmental threat[.]"); 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[EPA regulations] can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source.... Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.").

In § 402(p), adopted as part of the 1987 amendments, Congress required NPDES permits for the most significant sources of stormwater pollution un-

der so-called "Phase I" regulations. *See* 133 Cong. Rec. 983, 1006 (Jan. 8, 1987) (statement of Rep. Roe) ("[Section 402(p)] establishes an orderly procedure which will enable the major contributors of pollutants to be addressed first, and all discharges to be ultimately addressed in a manner which will not completely overwhelm EPA's capabilities."). Section 402(p) lists five categories of stormwater discharges, including discharges "associated with industrial activity," that are covered in Phase I. 33 U.S.C. § 1342(p)(2)(B). NPDES permits are required for all five categories of discharges. *Id.* §§ 1342(p)(1)–(2). A permit was required for such discharges by 1990. *Id.* § 1342(p)(4)(A).

All remaining stormwater discharges are to be covered by "Phase II" regulations. During Phase II, EPA is to study stormwater discharges not covered by Phase I and to issue regulations based on its study. *Id.* § 1342(p)(5)–(6). In 1999, EPA promulgated a Phase II regulation requiring NPDES permits for discharges from small municipal storm systems and small construction sites. We upheld most of that regulation in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), and remanded for further proceedings. EPA has not yet responded to the remand.

Stormwater discharges from churches, schools and residential properties, through rain gutters or otherwise, and from other relatively de minimus sources, are covered under Phase II rather than Phase I. It is within the discretion of EPA to promulgate Phase II regulations requiring, or not requiring, permits for such discharges.

3. Phase I Stormwater Regulations

In 1990, EPA promulgated "Phase I" regulations for the storm water discharges specified in § 402(p). 55 Fed. Reg. 47990 (Nov. 16, 1990); 40 C.F.R. § 122.26. For discharges "associated with industrial activity," which require NPDES permits, EPA's regulations provide:

> Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.

40 C.F.R. § 122.26(b)(14). The last sentence of this regulation refers to the Silvicultural Rule, thereby purporting to exempt from the definition of "discharges associated with industrial activity" any activity that is defined as a nonpoint source in the Silvicultural Rule. *See id.*

The preamble to the Phase I regulations makes clear EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program mandated by § 402(p). The preamble provides:

> The definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under NPDES. EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking. Accordingly, the definition of "storm water discharge associated with in-

> dustrial activity" does not include sources ... which are excluded under 40 CFR 122.27.

55 Fed. Reg. 47990, 48011 (Nov. 16, 1990).

In the 1987 amendments, Congress exempted many stormwater discharges from the NPDES permitting process. However, Congress made clear in § 402(p) that it did not exempt "discharges associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). Indeed, Congress specifically mandated that EPA establish a permitting process for such discharges. *See* 33 U.S.C. § 1342(p)(4)(A) ("[T]he Administrator *shall* establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) ["discharge[s] associated with industrial activity"] and (2)(C)." (emphasis added)). In *NRDC v. EPA*, 966 F.2d 1292 (9th Cir.1992), we struck down a part of EPA's Phase I regulations exempting point source discharges from construction sites of less than five acres. We wrote, "[I]f construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions from permitting requirements for such activity." *Id.* at 1306. Similarly, if silvicultural activity is "industrial in nature," § 402(p) requires that discharges from such activity obtain NPDES permits.

Industries covered by the Phase I "associated with industrial activity" regulation are defined in accordance with Standard Industrial Classifications ("SIC"). The applicable (and unchallenged) regulation provides that facilities classified as SIC 24 are among "those considered to be engaging in 'industrial activity.' " 40 C.F.R. § 122.26(b)(14)(ii). It is undisputed that "logging," which is covered under SIC 2411 (part of SIC 24), is an "industrial activity." SIC 2411 defines "logging" as "[e]stablishments primarily

engaged in cutting timber and in producing ... primary forest or wood raw materials ... in the field."

The regulation further defines the term "storm-water discharge associated with industrial activity" as follows:

> For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; *immediate access roads* and rail lines *used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility;* material handling sites;....

40 C.F.R. § 122.26(b)(14)(ii) (emphasis added).

The Timber Defendants contend that logging roads are not "immediate access roads" because they are not confined to the immediate area of the site where the logging takes place. We disagree. The Timber Defendants misunderstand the meaning of the term "immediate" as it is used in the regulations. The preamble to the Phase I regulations provides that "immediate access roads" means "roads which are exclusively or primarily dedicated for use by the industrial facility." 55 Fed. Reg. 47990, 48009 (Nov. 16, 1990).

The Timber Defendants also contend that logging roads are not "primarily dedicated" for use by the logging companies. Again, we disagree. We recognize that logging roads are often used for recreation, but that is not their primary use. Logging companies build and maintain the roads and their drainage systems pursuant to contracts with the State. Logging is also the roads' *sine qua non:* If there were no logging, there would be no logging roads.

Finally, the Timber Defendants contend that, even if the logging industry is classified by the Phase I rule and SIC 2411 as industrial, the logging sites are not "industrial facilities" because they are not typical industrial plants. Therefore, according to the Timber Defendants, any roads serving logging sites cannot be the "immediate access roads" covered by this rule. We continue to disagree. The definition of a "facility" engaging in "industrial activity" is very broad. The applicable Phase I rule provides that many industrial facilities beyond traditional industrial plants "are considered to be engaging in 'industrial activity,'" including mines, landfills, junkyards, and construction sites. 40 C.F.R. § 122.26(b)(14)(iii), (v), (x).

EPA's comments to the Phase I rules explain the breadth of the definition:

> In describing the scope of the term "associated with industrial activity", several members of Congress explained in the legislative history that the term applied if a discharge was "directly related to manufacturing, processing or raw materials storage areas at an industrial plant."

55 Fed. Reg. at 48007. However, EPA stated that it was not limiting the coverage of the rule to discharges referenced in this legislative history. It explained:

> Today's rule clarifies the regulatory definition of "associated with industrial activity" by adopting the language used in the legislative history and supplementing it with a description of various types of areas that are directly related to an industrial process (*e.g.*, indus-

> trial plant yards, immediate access roads and rail lines, drainage ponds, material handling sites, sites used for the application or disposal of process waters, sites used for the storage and maintenance of material handling equipment, and known sites that are presently or have been in the past used for residual treatment, storage or disposal).

Id.

We therefore hold that the 1987 amendments to the CWA do not exempt from the NPDES permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers. This collected runoff constitutes a point source discharge of stormwater "associated with industrial activity" under the terms of § 502(14) and § 402(p). Such a discharge requires an NPDES permit. As we explained in *NRDC v. EPA*, 966 F.2d at 1306, "if[logging] activity is industrial in nature, and EPA concedes that it is [*see* SIC 2411], EPA is not free to create exemptions from permitting requirements for such activity." The reference to the Silvicultural Rule in 40 C.F.R. § 122.26(b)(14) does not, indeed cannot, exempt such discharges from EPA's Phase I regulations requiring permits for discharges "associated with industrial activity."

4. Effect of Remand in *Environmental Defense Center, Inc. v. EPA*

In *Environmental Defense Center*, 344 F.3d at 863, in 2003 we remanded to EPA a portion of its Phase II stormwater regulations to allow EPA to consider, *inter alia*, whether stormwater discharges from logging roads should be included in Phase II

regulations. Amicus United States suggests that we delay ruling on the question whether stormwater discharges from logging roads must obtain permits under § 402(p)—that is, under Phase I regulations—until EPA has responded to the remand. We have just held that § 402(p) provides that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels is a "discharge associated with industrial activity," and that such a discharge is subject to the NPDES permitting process under Phase I. Whether EPA might, or might not, provide further regulation of stormwater runoff from logging roads in its Phase II regulations does not reduce its statutory obligation under § 402(p). We therefore see no reason to wait for EPA's action in response to our remand in *Environmental Defense Center*.

D. Summary

In some respects, we are sympathetic with EPA. When the FWPCA was passed in 1972, EPA was faced with a near-impossible task. The breadth of the definition of point source discharge contained in § 502(14) meant that EPA was suddenly required to establish an administrative system under which enormous numbers of discharges would be subject to a new and untested permitting process. Faced with this task, EPA exempted several large categories of point source discharges from the process in order to avoid the burden imposed by the breadth of the definition contained in § 502(14).

Recognizing the burden on EPA, as well as on some of the entities subject to the NPDES permitting requirement, Congress subsequently narrowed the definition of point source discharge by providing specific statutory exemptions for certain categories of

discharges. For example, in 1977, Congress exempted return flows from irrigated agriculture to alleviate the EPA's burden in having to permit "every source or conduit returning water to the streams from irrigated lands," which was what the text of the statute had required. 123 Cong. Rec. 38949, 38956 (Dec. 15, 1977) (Statement of Rep. Roberts); *see* CWA §§ 402(*l*), 502(14), 33 U.S.C. §§ 1341(*l*), 1362(14). Then in 1987, ten years later, Congress comprehensively revised stormwater regulation. It did so in part because the existing broad definition of point source discharge risked creating an "administrative nightmare" for the EPA. 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop). It also did so in part because under the existing definition a vast number of de minimus stormwater sources, many of which posed no environmental threat, required NPDES permits. As part of the 1987 amendments, Congress enacted § 402(p), which gives discretion to EPA to exclude from the permitting process de minimus sources of stormwater pollution.

However, in cases where Congress has not provided statutory exemptions from the definition of point source, federal courts have invalidated EPA regulations that categorically exempt discharges included in the definition of point source discharge contained in § 502(14). The most directly relevant example is *Costle*, in which the D.C. Circuit invalidated the original version of the Silvicultural Rule which had exempted all discharges from silvicultural activities. Other examples include *National Cotton Council of America v. EPA*, 553 F.3d 927, 940 (6th Cir. 2009) (invalidating EPA rule exempting pesticide residue from permitting requirements because "the statutory text of the Clean Water Act forecloses the EPA's Final Rule"); *Northern Plains Resource Coun-*

cil v. Fidelity Exploration and Development Co., 325 F.3d 1155, 1164 & n.4 (9th Cir. 2003) (refusing to grant deference to EPA's approval of Montana's permitting program that exempted groundwater pollutants from permitting requirements because "[o]nly Congress may amend the CWA to create exemptions from regulation"); *NRDC v. EPA*, 966 F.2d 1292, 1304–06 (9th Cir. 1992) (holding arbitrary and capricious EPA rule exempting various types of light industry and construction sites of less than five acres from permitting requirements). Not all examples involve invalidation of recently promulgated regulations. In *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), we invalidated an EPA regulation that exempted sewage discharges from vessels from the permitting process. In that case, the invalidated EPA regulation had been on the books since 1973.

Congress intentionally passed a "tough law." *Costle*, 568 F.2d at 1375. But Congress did not intend that the law impose an unreasonable or impossible burden. Congress has carefully exempted certain categories of point source discharges from the statutory definition. For those discharges that continue to be covered by the definition, the permitting process is not necessarily onerous, either for EPA or for an entity seeking a permit. For example, in appropriate circumstances a discharge may be allowed under a "general permit" requiring only that the discharger submit a "notice of intent" to make the discharge. As we explained in *Natural Resources Defense Council v. EPA*, 279 F.3d 1180, 1183 (9th Cir. 2002):

> NPDES permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollu-

> tant in a specific place and is issued after an informal agency adjudication process. *See* 40 C.F.R. §§ 122.21, 124.1–124.21, 124.51–124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. *See id.* §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. *See id.* § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. *Id.* § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. *Id.* § 122.28(b)(2)(iv).

Until now, EPA has acted on the assumption that NPDES permits are not required for discharges of pollutants from ditches, culverts, and channels that collect stormwater runoff from logging roads. EPA has therefore not had occasion to establish a permitting process for such discharges. But we are confident, given the closely analogous NPDES permitting process for stormwater runoff from other kinds of roads, that EPA will be able to do so effectively and relatively expeditiously.

CONCLUSION

For the foregoing reasons, we conclude that stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which an NPDES permit is required.

We therefore **REVERSE** the district court's grant of Defendants' motion to dismiss, and we **REMAND** to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Northwest Environmental Defense Center, Plaintiff,

v.

Marvin Brown, Oregon State Forester, in his official capacity; et al., Defendants,

and

Oregon Forest Industries Council, and American Forest and Paper Association, Intervenors.

Civil No. 06-1270-KI.

March 1, 2007.

OPINION AND ORDER

KING, District Judge.

Plaintiff Northwest Environmental Defense Center ("NEDC") brings this action under the Clean Water Act ("CWA") concerning discharges of stormwater from ditches alongside logging roads in the Tillamook State Forest. NEDC seeks to require defendants to obtain National Pollutant Discharge Elimination System ("NPDES") permits, which NEDC contends are required by the CWA in this situation. Before the court are State Defendants' (Marvin Brown, Oregon State Forester, and members of the Oregon Board of Forestry, Stephen Hobbs, Barbara Craig, Diane Snyder, Larry Giustina, Chris Heffernan, William Hutchison, and Jennifer Phillippi) Motion to Dismiss (#16) and Forest Products Defendants' (timber companies Hampton Tree Farms, Inc., Stimson Lumber Company, Georgia-Pacific West, Inc., and Swanson Group, Inc., along with intervenors Oregon Forest Industries Council and American Forest and

Paper Association) Motion to Dismiss First Amended Complaint (#21). The United States filed an amicus curiae brief. For the reasons below, I dismiss the First Amended Complaint.

ALLEGATIONS

The logging roads at issue in the Tillamook State Forest are the Trask River Road, running along the South Fork Trask River, and the Sam Downs Road, running along the Little South Fork of the Kilchis River. Ditches, channels, and culverts associated with logging roads often deliver collected stormwater into existing streams and rivers. The stormwater, polluted with sediment and other pollutants, degrades water quality and adversely impacts aquatic life. The discharges on these two roads are not authorized by NPDES permits. The State Defendants own and control the logging roads. The Forest Product Defendants haul timber on the roads and are contractually obligated to maintain the roads. According to NEDC, defendants violated the CWA by discharging pollutants and/or industrial stormwater from point sources along the Trask River Road and Sam Downs Road to waters of the United States without NPDES permits.

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) will only be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief." *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005) (internal quotation omitted). Normally, the review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. *Id.* The

court is not required to accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 972 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005). The court may also review a document extrinsic to the complaint if the authenticity of the document is not contested and the document is integral to the claims. *Fields v. Legacy Health System*, 413 F.3d 943, 958 n.13 (9th Cir. 2005). A second exception is that a court may take judicial notice of matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

DISCUSSION

I. Standing

The State Defendants contend that NEDC has not sufficiently alleged facts to maintain its representational standing.

NEDC alleges that it is a nonprofit corporation with the mission to protect and conserve the environmental and natural resources of the Pacific Northwest. Its members derive aesthetic, recreational, and other benefits from Oregon's waterways, including the rivers and tributaries near the Trask River Road and Sam Downs Road. NEDC members use and enjoy the Trask and Kilchis rivers, and their tributary waters, for fishing and other recreational activities. NEDC alleges that it has at least one member who is injured by defendants' discharge of pollutants and stormwater.

The State Defendants contend that this allegation is generic and insufficiently concrete and particularized to satisfy standing requirements because the allegation does not identify any specific members. NEDC argues that its allegations are sufficient,

specifically, that it does not need to identify a particular member in the complaint but can provide that information during discovery in a manner designed to protect the privacy interest of its members.

> An organization has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Individual members would have standing in their own right under Article III if "they have suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical, ... the injury is fairly traceable to the challenged action of the defendant; and ... it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw,* 120 S. Ct. at 704 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)).

Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000) (some internal citations omitted). The "injury in fact" requirement in environmental cases is met if an individual "adequately shows that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct." *Id.*

Here, the assertion of CWA protection for the rivers and tributaries near the logging roads is germane to NEDC's purpose. There is also no argument

by defendants that an individual member's participation in the suit is necessary. The dispute centers on whether an individual member has suffered an "injury in fact." The general allegation is that individual NEDC members use the two rivers for recreation and at least one member has been injured by the discharges.

Most of the cases cited by defendants, including *Ecological Rights,* hash out this issue in a motion for summary judgment when there is an evidentiary record, typically in the form of a declaration from an individual member explaining their particular use of the area and injury suffered by the environmental harm. Because this is a motion to dismiss, there is no such declaration. I agree with NEDC that its allegations are sufficient for standing purposes. In particular, it does not appear beyond doubt that NEDC can prove no set of facts in support of its complaint which would entitle it to relief. In a case which survives a motion to dismiss, a particular member can be identified during discovery and the issue raised again in a motion for summary judgment if defendants still believe that standing does not exist. I acknowledge that the court in *Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, New York,* 250 F. Supp. 2d 48 (N.D.N.Y. 2003), concluded differently and granted a motion to dismiss for lack of standing based on a citizen group's complaint with similar general environmental allegations but no individual members identified. I am unpersuaded by *Arbor Hill's* analysis.

I conclude that the allegations concerning standing are sufficiently pled and do not need to be proven for a particular individual until the summary judgment stage of the proceeding.

II. Viability of a Citizen Suit

The State Defendants contend that NEDC fails to satisfy the CWA's procedural prerequisites to a citizen suit under 33 U.S.C. § 1365.

Under the CWA, a citizen may bring an action against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator of a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1).

NEDC contends that its allegations that defendants discharged pollutants or industrial stormwater without a valid NPDES permit fall within the statutory limits of a citizen suit. NEDC notes that the CWA definition of effluent standard or limitation includes an unlawful act under § 1311(a). 33 U.S.C. § 1365(f)(1). Section 1311(a), in turn, makes it unlawful to discharge any pollutant except in compliance with the NPDES permit required by § 1342, among other things. NEDC thus argues that a citizen suit to enforce an "effluent limitation" can be based on allegations that the defendant is discharging without an NPDES permit. NEDC also relies on *Ass'n to Protect Hammersley, Eld and Totten Inlets v. Taylor Resources*, 299 F.3d 1007 (9th Cir. 2002) [hereinafter *APHETI*], to argue that citizens may bring suit to require a permit.

Based on NEDC's argument, the State Defendants note that NEDC neither asserts a violation of an order nor identifies a standard allegedly violated. Thus, the issue is limited to whether NEDC properly identified an effluent limitation that has been violated. Briefly, the State Defendants contend that Congress did not require permits for all stormwater

dischargers and the EPA has determined that regulatory action is not needed. The State Defendants rely on 33 U.S.C. § 1342(p), contending that it expressly excludes any point source stormwater discharges at issue here from coverage under the NPDES program until such time as EPA decides to regulate them.

The State Defendants distinguish *APHETI* because it concerned a discharge from aquaculture, which is not expressly addressed in the CWA, unlike the stormwater at issue here. Furthermore, the State Defendants contend that NEDC's quote from *APHETI* was on the issue of whether citizen suits are "stop gaps," precluded in areas in which federal or state regulation is active. The State Defendants contend that issue is irrelevant to the case here.

In *APHETI*, a citizen group brought suit contending that a mussel-harvesting company operating in Puget Sound violated the CWA by discharging pollutants, namely the biological materials emitted from the mussels, without an NPDES permit. The state agency that administered the NPDES permit program had determined that a permit was not required. The court allowed the citizen suit to continue, stating:

> Although the EPA or an authorized state agency may be charged with enforcement of the Clean Water Act, neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the Clean Water Act.

Id. at 1012.

I see nothing distinguishing the case before me that makes this statement any less true. I conclude that NEDC is not barred from bringing this citizen suit.

III. NPDES Permit Requirement

A. Statutory and Regulatory Background

Section 301(a) of the CWA prohibits the discharge of any pollutant into the waters of the United States except in compliance with several provisions, including NPDES permits. 33 U.S.C. § 1311; 33 U.S.C. § 1342. NPDES requirements are violated if a defendant discharges a pollutant to navigable waters from a point source. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). A few definitions:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6).

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not in-

> clude agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14).

The CWA was amended in 1987 to add Section 402(p), which enacted a two-phase regulatory program for stormwater. Phase I imposed a general moratorium on the issuance of NPDES permits to discharges composed entirely of stormwater until October 1, 1994. 33 U.S.C. § 1342(p)(1). Five categories of stormwater discharges were excepted from the moratorium and are known as Phase I discharges. 33 U.S.C. § 1342(p)(2).

Phase I discharges include: (1) a discharge for which a permit was issued before February 4, 1987; (2) a discharge associated with industrial activity; (3) a discharge from a municipal separate storm sewer system serving a population of 250,000 or more; (4) a discharge from a municipal separate storm sewer system serving a population between 100,000 and 250,000; and (5) a discharge for which EPA or the state determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. *Id.* Phase I discharges require NPDES permits. 33 U.S.C. § 1342(p)(3).

Section 402(p) also directed EPA to study stormwater discharges, the extent of pollutants in them, and methods to control them to the extent necessary to mitigate impacts on water quality. EPA was required to issue regulations to designate stormwater discharges, other than the Phase I discharges, and to establish a program to regulate them as necessary to protect water quality. 33 U.S.C. § 1342(p)(5)-(6). These are known as Phase II discharges. In 1999,

EPA issued the final Phase II stormwater regulations which designated two additional categories of stormwater discharges that required NPDES permits: (1) municipal separate storm sewer systems (MS4s) serving less than 100,000 people; and (2) construction sites that disturb one to five acres of land. 40 C.F.R. § 122.26(a)(9)(I).

B. NEDC's Theories of Liability

NEDC has two theories of liability. The first theory is that the discharges at issue are regulated under Phase I as point source stormwater discharges associated with industrial activity, namely facilities within Standard Industrial Classification ("SIC") 24 (lumber and wood products) and SIC 2411 (logging). Because the Ninth Circuit held that the silvicultural regulation, 40 C.F.R. § 122.27, does not exempt point source discharges from the NPDES program, and since no other exclusions from the Phase I rule apply, NEDC argues that defendants must obtain NPDES permits for the point source discharges along their haul routes.

NEDC's alternative theory notes that the Ninth Circuit recently invalidated, as applied to forest roads, the NPDES permit exemption for unregulated stormwater discharges codified at 40 C.F.R. § 122.26(a)(9)(I). According to NEDC, this means that any discharge of pollutants from the forest roads at issue remain subject to and prohibited by Section 301(a) unless authorized by an NPDES permit.

C. Application of Section 402(p) to Stormwater Discharges on Forest Roads

Section 402(p) requires an NPDES permit for discharges associated with industrial activity, one of

the so-called Phase I discharges. 33 U.S.C. § 1342(p)(2)(B).

In 1980, EPA promulgated the current silvicultural[1] point source regulation defining those silvicultural activities that constitute point sources and those that constitute nonpoint sources.

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

40 C.F.R. § 122.27(b)(1).

Defendants contend that the timber harvesting activities and use of the logging roads fall within this

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[1] Silviculture: a branch of forestry dealing with the development and care of forests. Merriam-Webster's Online Dictionary (Jan. 8, 2007), http://www.m-w.com/cgi-bin/dictionary?book=Dictionary &va=silvicultural.

exception and thus require no permit. They also note that timber harvesting operations are expressly defined to be a nonpoint source activity in the regulation. Defendants contend that *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), supports the proposition that natural runoff includes runoff channeled by forest roads.

NEDC contends that *Forsgren* limited the scope of the permit exemption in 40 C.F.R. § 122.27(a) to cases in which there is natural runoff or nonpoint source pollution, which NEDC argues is not the case for the forest roads at issue.

Defendants dispute NEDC's interpretation of *Forsgren* and contend that in finding that the regulatory list of silvicultural point sources is not exhaustive and that the aerial discharges in question were point sources, the court did not invalidate the portion of the regulation classifying runoff from harvesting operations, surface drainage and road construction and maintenance as nonpoint sources.

The State Defendants contend that the logging roads do not qualify as point sources under the reasoning in *Forsgren*. They argue that *Forsgren* rejected the contention that every road is a point source requiring an NPDES permit because of the residue left on the roads by vehicles which mixes with the stormwater. Instead, *Forsgren* supports the argument that forestry roads from which there is natural runoff are nonpoint sources of pollution.

NEDC contends that it has alleged that the "ditches, culverts, channels, pipes and other mechanisms" on both roads are point sources. According to NEDC, the State Defendants unpersuasively stretch

dicta found in *Forsgren,* a case about the aerial application of pesticides.

In *Forsgren,* plaintiffs contended that the United States Forest Service violated the CWA by instituting an aerial insecticide spraying program over national forest lands without obtaining an NPDES permit. All agreed that the aerial spraying program met all elements of the definition for point source pollution. The Forest Service relied on the silvicultural exemption, arguing that the aerial spraying was a silvicultural pest control activity, defined by the silvicultural exemption as a nonpoint source. *Id.* at 1182-85. The court explained:

> Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits. The most common example of nonpoint source pollution is the residue left on roadways by automobiles.... When it rains, the rubber particles and copper dust [from brake linings] and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean. Nonpoint source pollution of this kind is the largest source of water pollution in the United States, far outstripping point source pollution from factories, sewage plants, and chemical spills.

Id. at 1184.

The court reasoned that the statutory definition of point source was unambiguous and that the Forest Service "cannot contravene the will of Congress through its reading of administrative regulations." *Id.* at 1185-86. The court applied the modifying phrase, "from which there is natural runoff," to all the activities listed in the sentence. Thus, it held that "the regulation excludes from the definition of point source pollution only those silvicultural pest control activities *from which there is natural runoff,* rather than *all* silvicultural pest control activities." *Id.* at 1186 (emphasis in the original). The court also noted that "nonpoint source pollution involves runoff that picks up scattered pollutants and washes them into water bodies." *Id.* Applying this interpretation to the spraying program, the court concluded: "Because discharging pesticide from aircraft directly over covered waters has nothing to do with runoff, it is not a nonpoint source activity." *Id.* at 1187.

Turning to the first sentence in the silvicultural exemption, the court held that the four activities listed (rock crushing, gravel washing, log sorting, or log storage facilities) are not an exhaustive list of point source activities associated with silviculture. *Id.* at 1188. In conclusion, the court held that the aerial spraying program was a point source that required an NPDES permit. *Id.*

Forsgren is clearly controlling here. Some of the cases cited by the parties are not persuasive because they are pre-*Forsgren* and consider the list of point sources in the exemption to be exhaustive. *See Newton County Wildlife Ass'n v. Rogers,* 141 F.3d 803, 810 (8th Cir. 1998); *O'Aha'Ino v. Galiher,* 28 F. Supp. 2d 1258, 1261 (D. Haw. 1998). Another case, *North Carolina Shellfish Growers Ass'n v. Holly Ridge As-*

socs., 278 F. Supp. 2d 654, 681 (E.D.N.C. 2003) ("The ... Tract contains an extensive network of seventeen ditches specifically designed to concentrate and accelerate the flow of stormwater from the Tract. It is difficult to imagine how drainage from such a network could be deemed 'natural runoff ....'"), makes a brief statement without analysis and thus lacks persuasive power.

Based on *Forsgren,* we know that the term silvicultural point source does not include nonpoint source silvicultural activities of harvesting operations from which there is natural runoff, surface drainage from which there is natural runoff, and road construction and maintenance from which there is natural runoff. NEDC alleges that the point source activities are the building and maintenance of the forest roads and the hauling of timber on the roads. Under § 122.27(b)(1) as interpreted by *Forsgren,* those activities are not point sources when the natural runoff flows into the waters of the United States. We also know from *Forsgren* that "nonpoint source pollution involves runoff that picks up scattered pollutants and washes them into water bodies." *Id.* at 1186. Thus, the fact that pollutants deposited on top of the roads during timber hauling end up being washed into the water bodies does not turn the road system with its associated ditches and culverts into a point source. The road/ditch/culvert system and timber hauling on it is a traditional dispersed activity from which pollution flowing into the water cannot be traced to single discrete sources. *See id.* at 1184. The activities complained of here are a far cry from the act complained of in *Forsgren,* namely, spraying pesticide from an airplane.

NEDC also relies on *Environmental Protection Information Center v. Pacific Lumber* Co., No. C01-2821-MHP, 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003) [hereinafter *EPIC*], to argue that the exemption in 40 C.F.R. § 122.27 cannot encompass things which fall within the statutory definition of point source. NEDC also contends that *EPIC* holds that water collected by the timber company's stormwater system was not natural runoff from nonpoint source silvicultural activities. Based on *EPIC* and *Forsgren,* NEDC argues that 40 C.F.R. § 122.27 does not exempt from the NPDES permit requirement any point source discharge of stormwater associated with silvicultural activities because polluted stormwater that is collected and conveyed to rivers and streams is not natural runoff but rather a point source discharge requiring an NPDES permit.

The United States contends that *EPIC* was wrongly decided when the court declined to defer to the EPA's interpretation of its regulations. An agency's interpretation of its own ambiguous regulation is controlling unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452, 461 (1997).

I reviewed *EPIC* and its statement that

> the type of "harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff" identified in section 122.27 cannot encompass the ditches, culverts, channels, and gullies otherwise deemed 'point sources' under section 502(14). Such ditches and culverts fall within section 502(14)'s "point source" category, and section 122.27 cannot alter or modify this definition.

Id. at *14 (internal citations omitted). I am unconvinced, however, and believe that *EPIC* was wrongly decided. It contradicts *Forsgren's* explanation of traditional sources of nonpoint source pollution.

Because I conclude that the silvicultural exemption applies, there is no need to address the parties' arguments about whether there is a Phase I discharge associated with industrial activity. I dismiss the § 402(p) claim.

D. Application of Section 301(a) to Stormwater Discharges on Forest Roads

NEDC argues that if the discharges here are not regulated by Section 402(p), 33 U.S.C. § 1342(p), and the Phase I rules, then the discharges require a permit under Section 301, 33 U.S.C. § 1311. NEDC bases this argument on *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) [hereinafter *EDC], cert. denied*, 541 U.S. 1085 (2004) contending that the Ninth Circuit rejected EPA's attempt to exempt forest roads from regulation. According to NEDC:

> Since the apparent exemption for forest roads was at the heart of what EPA was told to reconsider, the Phase II exemption does not and cannot exempt stormwater discharges from forest roads from the NPDES permit requirement until EPA has addressed the remand.
>
> . . .
>
> . . . Since the moratorium expired on October 1, 1994, and since EPA has not issued a valid Phase II exemption for stormwater discharges from forest roads, those discharges

> remain subject to Section 301(a)'s general prohibition on the "discharge of pollutants."

Pl.'s Opp'n to Industry's Mot. to Dismiss at 27-28.

Defendants contend that in *EDC*, the court rejected the contention that EPA was required to designate forest roads as sources of stormwater pollution and remanded the issue of whether all stormwater discharges required NPDES permits on procedural, not substantive, grounds. According to Defendants, the remand did not create a regulation but instead restored the status quo, which was no regulation of stormwater on forest roads.

In *EDC*, the Ninth Circuit consolidated three cases which raised 22 constitutional, statutory, and procedural challenges to the Phase II stormwater rule EPA issued in October 1999. In part, Petitioners contended that EPA arbitrarily failed to regulate forest roads under the Phase II rule despite clear evidence of the need for pollution control of the stormwater drainage from those roads. *Id.* at 860-61. EPA raised several procedural arguments but "[did] not seriously address the merits of Petitioners' objections." *Id.* at 862. The court held:

> Having concluded that the objections of the Environmental Petitioners are not time-barred, and that we have jurisdiction to hear them, but that EPA failed to consider those objections on the merits, we remand this issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that

> are adequately set forth to permit judicial review.

Id. at 863. In conclusion, the court noted its remand of the forest road issue as well as two other issues and stated: "We affirm all other aspects of the Phase II rule against the statutory, administrative, and constitutional challenges raised in this action." *Id.* at 879.

For the most part, the Ninth Circuit affirmed the Phase II rule. The remand was for limited purposes. The Phase II rule did not set up exemptions, it named additional areas requiring NPDES permits. It does not follow from the Ninth Circuit holding in *EDC* that permits are now required for forest roads while the EPA addresses Petitioners' objections about the lack of regulation on the merits.

This interpretation of the regulatory scheme has been followed in other courts. In *Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325 (D. Vt. 2004), the court held that a shopping plaza owner did not violate § 301(a) for failing to obtain an NPDES permit for stormwater discharge off the parking lot. *Id.* at 331-32. The plaintiff contended that § 301(a)'s prohibition on all stormwater discharges without permits again became law once the permit moratorium expired on October 1, 1994. The court stated:

> [Plaintiff] may be correct that upon the expiration of the permit moratorium all stormwater discharges without permits were in violation of § 301(a). This is because EPA did not issue the Phase II rules until December 8, 1999 and they did not become effective until February 7, 2000. Thus, it could be ar-

> gued that during the more than five-year period between the end of the moratorium and the effective date of the Phase II rules, all stormwater discharges without a permit, including the Burlington Plaza, were subject to the permit requirement and were violating § 301(a).
>
> The court need not address this question, however. As discussed, the plain language of § 402(p) authorizes EPA to issue regulations designating which stormwater discharges are to be regulated and which are to be left unregulated. When those Phase II regulations went into effect, a stormwater discharge left unregulated fell into compliance with § 402(p) unless EPA or an authorized state agency later exercised its residual designation authority to require an NPDES permit for that discharge. A stormwater discharge that complies with § 402(p) does not violate § 301(a).

Id. at 331 (internal citation omitted).[2]

Accordingly, the motion to dismiss the § 301(a) claim is granted.

IV. Amendment

NEDC seeks leave to amend its complaint if I grant the motion to dismiss but does not explain what additional facts can be alleged. I can think of

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[2] I realize that NEDC alleges that the stormwater discharges are Phase I discharges and the plaintiff in *Hannaford* did not make a similar allegation. NEDC's allegation, however, is a legal conclusion and not an allegation of a material fact that I must accept as true.

none that will change this analysis and conclude that any amendment is futile.

CONCLUSION

Plaintiff's Request for Judicial Notice (#47) is granted.[3] State Defendants' Motion to Dismiss (#16) and Forest Products Defendants' Motion to Dismiss First Amended Complaint (#21) are granted.

IT IS SO ORDERED.

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[3] Several parties requested judicial notice of several exhibits without drawing objection. I grant all such requests. Plaintiff objected to Exhibits 2 through 4 filed by the Forest Product Defendants. The exhibits are portions of briefs filed by the United States in other cases. The Forest Product Defendants relied on the exhibits as evidence of the position of the federal agency charged with interpreting the CWA. Because the United States filed an amicus curiae brief in this action, I will rely on that as the statement of the agency's position and decline to take judicial notice of Exhibits 2 through 4.

STATUTES AND REGULATIONS

33 U.S.C. § 1251 Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. * * *

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States.

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

33 U.S.C. § 1288. Areawide waste treatment management

* * *

(b) Planning process

(1)(A) Not later than one year after the date of designation of any organization under subsection (a) of this section such organization shall have in operation a continuing areawide waste treatment management planning process consistent with section 1281 of this title. * * *

* * *

(2) Any plan prepared under such process shall include, but not be limited to—

* * *

(F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for live-stock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

* * *

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1314. Information and guidelines.

* * *

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution. The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from –

(A) agricultural and silvicultural activities, including runoff from fields and crop and forestlands * * *.

* * *

33 U.S.C. § 1342. National pollutant discharge elimination system.

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

* * *

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

* * *

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1993, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

* * *

33 U.S.C. § 1362 Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sew-age, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and in-

dustrial, municipal, and agricultural waste discharged into water. * * *

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

* * *

33 U.S.C. § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * *

33 U.S.C. § 1369. Administrative procedure and judicial review

* * *

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under

section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

* * *

40 C.F.R. § 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

* * *

(b) *Definitions*

* * *

(13) *Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) *Storm water discharge associated with industrial activity* means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at page 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material hand-

ling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. * * *

40 C.F.R. § 122.27 Silvicultural activities (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.

(b) *Definitions.* (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

(2) *Rock crushing and gravel washing facilities* means facilities which process crushed and broken

stone, gravel, and riprap (See 40 CFR part 436, subpart B, including the effluent limitations guidelines).

(3) *Log sorting and log storage facilities* means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking). (See 40 CFR part 429, subpart I, including the effluent limitations guidelines).

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Environmental Protection Information Center v. Pacific Lumber Company, et al.

[C 01-2821]

[Caption omitted in printing]

[November 17, 2003]

EPA'S STATEMENT OF NON-OPPOSITION AND MEMORANDUM IN SUPPORT OF PALCO'S MOTION TO DISMISS

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Pursuant to Local Rule 7-3(b), the U.S. Environmental Protection Agency ("EPA") hereby files its Statement of Non-Opposition and Memorandum in Support of Pacific Lumber Company and Scotia Pacific LLC's (collectively "PALCO") Motion to Dismiss.

INTRODUCTION

On July 21, 2001, the Environmental Protection Information Center ("EPIC") filed a citizen suit under section 505(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a), against PALCO, alleging they violated the CWA by discharging pollutants without a National Pollutant Discharge Elimination System ("NPDES") permit (the First and Second Claims for Relief). *See* First Amended Complaint, ¶¶ 55-62.[1] On September 24, 2001, EPIC filed an amended complaint adding the U.S. Environmental Protection Agency (EPA) as a defendant and containing a challenge under the Administrative Procedure Act to EPA's silvicultural regulation at 40 C.F.R. § 122.27 (the Third Claim for Relief). First Amended Complaint, ¶¶ 63-64. Specifically, EPIC alleged that EPA's regulation was ultra vires because it "effectively exempt[s] discharges of stormwater and pollutants from ditches, channels, pipes, culverts, man-made gullies, and other discrete conveyances associated with silvicultural activities." First Amended Complaint, ¶ 64.

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[1] EPIC does not allege that PALCO's silvicultural operations include discharges from any of the silvicultural point sources listed in 40 C.F.R. § 122.27. Accordingly, EPS's brief is founded on the assumption that PALCO's silvicultural operations at issue in this litigation do not included any of the silvicultural point sources listed in 40 C.F.R. § 122.27.

On October 14, 2003, the court denied EPIC's motion for summary judgment on its Third Claim for Relief. The court ruled that EPA's regulation defining "silvicultural point source" was based on a permissible construction of the Clean Water Act, noting that the scope of EPA's definition, at 40 C.F.R. § 122.27, must be read not to exclude sources that are point sources under the Clean Water Act's definition at section 502(14). 33 U.S.C. § 1362(14). The court stated that its ruling did not affect the legitimacy of EPIC's other claims for relief

On November 3, 2003, PALCO filed a motion to dismiss EPIC's First and Second Claims for Relief. EPA hereby submits this Statement of Non-Opposition and Memorandum in Support of PALCO's Motion to Dismiss pursuant to Local Rule 7-3(b).

STATUTORY BACKGROUND

In 1987, Congress amended the CWA by adding a new section 402(p), 33 U.S.C. § 1342(p), which establishes an orderly, two-phase process for the regulation of storm water point source discharges. In section 402(p)(1), Congress imposed a general moratorium on NPDES permitting requirements for discharges composed entirely of storm water, effective until October 1, 1992. 33 U.S.C. § 1342(p)(1).[2] In section 402(p)(2), Congress identified the following five types of storm water discharges that it excluded from the moratorium: (1) "discharge[s] with respect to which a permit has been issued under [section 402] before February 4, 1987;" (2) "discharge[s] associated

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[2] In the Water Resources Development Act of 1992, Public Law No. 102-580, 106 Stat. 4797, 4862 (1992), Congress extended this date until October 1, 1994, which is the date that currently appears in the U.S. Code.

with industrial activity;" (3) "discharge[s] from a municipal separate storm sewer system serving a population of 250,000 or more" ("large MS4s"); (4) "discharge[s] from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000" ("medium MS4s"); and (5) "discharge[s] for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2). These section 402(p)(2) discharges are commonly referred to as "Phase I" discharges.

In section 402(p)(5), Congress directed EPA, in consultation with the States, to conduct studies for the purpose of identifying "storm water discharges or classes of discharges for which permits were not yet required;" determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and establishing procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality. 33 U.S.C. § 1342(p)(5)(A)-(C). Congress further required EPA, following the completion of these studies, to "designate storm water discharges, other than those discharges described in [section 402(p)(2)]" for regulation and to establish a comprehensive program to regulate them. 33 U.S.C. § 1342(p)(6). The regulations designating these sources and establishing a regulatory program for them are known as EPA's "Phase II" storm water regulations. Any remaining point sources not designated under Phases I and II are not required to obtain an NPDES permit for storm water discharges.

ARGUMENT

CWA section 301(a) only prohibits discharges that are not "in compliance" with certain other sections of the Act, including section 402. 33 U.S.C. § 1311(a). Consequently, discharges composed entirely of storm water from PALCO's silviculture operations that are "in compliance" with section 402(p) do not violate section 301(a).[3] PALCO is not required to obtain an NPDES permit for those discharges composed entirely of storm water because they do not fall into any of the categories of discharges regulated by EPA pursuant to its authority under section 402(p) of the CWA. Thus, such discharges do not require a NPDES permit to be "in compliance" with section 402 for purposes of section 301(a).

A. Discharges Composed Entirely of Storm Water From Silviculture Activities are not Subject to Regulation Under the Phase I Storm Water Program.

Congress identified five categories of storm water discharges to be regulated under Phase I of the storm water program: (1) discharges with respect to which a permit has been issued under section 402 before February 4, 1987; (2) discharges associated with industrial activity; (3) discharges from large MS4s; (4) discharges from medium MS4s; and (5) discharges for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality

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[3] Section 301(a) of the CWA states that "[e]xcept as in compliance with this section and sections [302, 306, 307, 318, 402, and 404] of [the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Of the referenced sections, only section 402 is relevant to this matter.

standard or is a significant contributor of pollutants to waters of the United States. 33 U.S.C. § 1342(p)(2). Storm water discharges from PALCO's silvicultural activities do not fall within any of these categories. First, with the exception of the four specific types of silvicultural activity identified as point sources under 40 C.F.R. § 122.27 (which are not relevant here), storm water discharges from silvicultural activities had not been issued NPDES permits prior to 1987. Therefore, such discharges are not regulated under section 402(p)(2)(A). 33 U.S.C. § 1342(p)(2)(A). In addition, storm water point source discharges from silviculture activities are not regulated under section 402(p)(2)(B) or (C) because they are not discharges from a large or medium municipal separate storm sewer system. 33 U.S.C. § 1342(p)(2)(C) and (D).

Nor is silviculture an "industrial activity" as that term is used in section 402(p)(2)(B). The introductory text to the definition of "storm water discharge associated with industrial activity" in EPA's regulations explains that the term "does not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). In 40 C.F.R. § 122.27(b), EPA excluded runoff from certain silvicultural activities from the NPDES program regardless of whether they were point source discharges. Consequently, EPA did not incorporate silvicultural storm water discharges into the definition of "storm water discharges associated with industrial activities."[4] In fact, the defini-

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[4] EPA recognizes that under this Court's October 14 decision granting EPA's motion for summary judgment on EPIC's Third Claim for Relief, the court stated that "where the runoff system utilizes the kinds of conduits and channels embraced by section

tion of "associated with industrial activities" was litigated in the Ninth Circuit, which did not disturb this portion of the regulation. *NRDC v. EPA*, 966 F.2d 1292, 1301 (9th Cir. 1992).

Moreover, in the Ninth Circuit's recent review of challenges to EPA's "Phase II" storm water regulations, the Court recognized that EPA had not required NPDES permits for forest roads under section 402(p). *Environmental Defense Center v. EPA*, 344 F.3d 832, 861 (9th Cir. 2003). In fact, the Ninth Circuit remanded this issue back to the Agency to address a comment received during the Phase II rulemaking requesting EPA to regulate storm water discharges from forest roads under section 402(p)(6). If storm water runoff discharges from forest roads were already required to have obtained an NPDES permit under the Phase I regulations, then the remand would have been unnecessary.[5]

502(14) [of the CWA], section 122.27 does not control" because it is no longer the kind of "natural runoff" targeted by 122.27. Opinion at 20. However, even if the runoff from PALCO's operations utilizes such "conduits and channels," it is not subject to EPA's Phase I storm water regulations because, as described above, it is not an "industrial activity" as EPA defined the term when it promulgated the Phase I regulations.

[5] EPIC contends that PALCO's operations are "industrial activities" under EPA's Phase I regulations because they fit under Standard Industrial Classification ("SIC") 24 (lumber and wood products), which EPA's Phase I regulations specifically encompass. *See* 40 C.F.R. § 122.26(b)(14)(ii). EPA disagrees. In 1995, EPA submitted a report to Congress on storm water discharges potentially to be addressed by Phase II of the storm water program. The report included a description of the scope of EPA's Phase I regulations. In that report, EPA described SIC code 24 as including facilities that use wood as their primary raw material (such as log storage and handling, untreated wood lumber and residue generation activities, wood surface protection activ-

Finally, PALCO's operations are not included in the final category of Phase I discharges (discharges for which EPA or an authorized State determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States) because neither EPA nor California (which is authorized to administer the NPDES program) has determined that silviculture storm water discharges contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States. *See* 33 U.S.C. § 1342(p)(2)(E).

B. Storm Water Discharges From PALCO's Silvicultural Activities are not Currently Subject to Regulation Under the NPDES Program.

Under the 1987 amendments, Congress required only those storm water point sources identified in section 402(p)(2) or pursuant to section 402(p)(6) to obtain NPDES permits. Section 402(p)(2) identifies specific categories of discharges required to obtain NPDES permits; under section 402(p)(6), Congress gave EPA the discretion to decide what additional point source storm water point source discharges would require NPDES permits and which would not. 33 U.S.C. § 1342(p)(2) and (p)(6). Moreover, section 402(p)(6) did not require implementation of the

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ities, wood preservation activities, and wood assembly/fabrication activities) and noted that silvicultural activities fell within SIC codes 01-09 (which contain agricultural activities, including forestry). *See* EPA's March 1995 Report to Congress, "Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program," at 2-23, n.8 and E-2 to E-3, copy of relevant pages attached hereto as EPA Exhibit "A".

NPDES program for designated sources; rather, it required only that EPA establish a "comprehensive program." Had Congress intended that all storm water point source discharges remain subject to NPDES permit requirements, the directive in section 402(p)(6) that EPA "designate" sources "to be regulated" would be meaningless. 33 U.S.C. § 1342(p)(6). Therefore, even after Phase I and Phase II, a category of unregulated sources remains – those sources that EPA or a State or Tribal permitting authority determines need not be regulated to protect water quality.

EPIC has previously relied on a pre-1987 court decision, *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), to support its assertion that all point source discharges of pollutants require NPDES permits. This reliance is misplaced. *See* Pl. Motion for Partial Summary Judgment on Third Claim for Relief at 3. Relying on the language of the statute as it existed in 1973, as well as its legislative history, the D.C. Circuit in *NRDC v. Costle* held that Congress intended the NPDES permit to be "the only means" by which a point source discharger can avoid liability under section 301(a). *Costle*, 568 F.2d at 1374. However, the 1987 amendments to the CWA, which added section 402(p), established a new structure for dealing with point source storm water discharges. In effect, section 402(p) overturned the D.C. Circuit's holding as it applied to storm water discharges and authorized EPA to "exempt" certain storm water discharges from NPDES permit requirements by restricting the scope of discharges to be regulated under Phase II to only those point source discharges that EPA determined should be regulated to protect water quality. 33 U.S.C. § 1342(p)(6).

In its Phase II regulations, EPA designated two additional categories of storm water discharges that require NPDES permits: discharges from small municipal separate storm sewer systems ("small MS4s") and discharges from construction sites that disturb one to five acres. 40 C.F.R. § 122.26(a)(9)(i)(A) and (B). Discharges from silviculture do not fall into either of these categories. EPA also created residual designation authority to address two other cases: where EPA or an authorized State or Tribe determines that storm water controls are needed for the discharge based on wasteload allocations that are part of total maximum daily loads ("TMDLs") that address the pollutant of concern and where EPA or an authorized State or Tribe determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. 40 C.F.R. § 122.26(a)(9)(i)(C) and (D). The Ninth Circuit upheld this "residual designation authority" in *Environmental Defense Center v. EPA*, 344 F.3d at 875. In other words, unless a storm water point source discharge is subject to NPDES permitting under one of the regulatory sections covering Phase II (or under the Phase I regulations), it is not required to obtain an NPDES permit. Neither EPA nor California has made such a determination for discharges from silviculture. In addition, neither EPA nor California has made such a determination for PALCO's operations.

EPA declined to regulate discharges from forest roads in the Phase II rulemaking. This decision was challenged in a petition for review of the regulation in the Ninth Circuit. On September 15, 2003, the Ninth Circuit issued a revised opinion in *Environmental Defense Center, Inc. v. EPA ("EDC")*, which remanded the forest roads issue to EPA "so that it

may consider in an appropriate proceeding Petitioners' contention that section 406(p)(6) requires EPA to regulate forest roads." 344 F.3d at 863. The court found that, in promulgating the Phase II regulations, EPA had not adequately responded to the comments during the rulemaking that section 402(p)(6) requires that the Phase II rule contain provisions regulating storm water discharges from forest roads. If storm water discharges from forest roads were subject to regulation under NPDES, the remand would have been unnecessary.

EPA is currently in the process of developing its response to the remand. Regardless of how EPA may address the court's remand, one thing is clear: the *EDC* opinion recognizes that storm water discharges from forest roads are not currently subject to NPDES permit requirements, and will not be subject to them, unless and until EPA regulates them under section 402(p)(6). In fact, the Ninth Circuit explicitly recognized that EPA could, in its action on remand, reject the Petitioners' contention that section 402(p)(6) requires EPA to regulate storm water discharges from forest roads. *Id.*

CONCLUSION

For the reasons set forth above, PALCO's Motion to Dismiss should be granted.

Respectfully submitted.

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Assistant Attorney General
Environment and Natural
Resources Division

[Signature block omitted in printing]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

3:06 CV 01270

Northwest Environmental Defense Center v. Marvin Brown, Oregon State Forester, in his Official capacity, et al.

[December 6, 2006]

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UNITED STATES' AMICUS CURIAE BRIEF

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I. INTRODUCTION

The Northwest Environmental Defense Center ("NEDC") has brought this citizen suit against Oregon State officials (state defendants) and private forestry companies pursuant to section 505(a) of the Clean Water Act ("CWA" or "the Act"). 33 U.S.C. § 1365(a). NEDC specifically alleges that the defendants are violating sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311(a) and 1342, by illegally discharging "pollutants and/or industrial stormwater" from "ditches, channels, culverts, pipes and other 'point sources'" along two forestry roads in Oregon's Tillamook State Forest without NPDES permits.[1] First Amended Complaint (FAC), ¶¶ 2, 4. In addition, NEDC alleges that defendants "have violated the Act by failing to apply for NPDES permits for their discharges from . . . hundreds of other locations throughout Oregon State Forests where logging roads deliver pollutants and/or industrial stormwater to rivers and streams." *Id.* at ¶ 6.

State defendants have filed a motion to dismiss. The American Forest and Paper Association and Oregon Forest Industries Council have also intervened as defendants, and have filed a motion to dismiss on behalf of themselves and the private forestry company defendants (collectively "private defendants"). Tillamook County has also intervened in support of defendants' motions to dismiss. Oral argument on these motions is scheduled for January 17, 2007.

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[1] NPDES stands for National Pollutant Discharge Elimination System.

The United States files this *amicus curiae* brief in support of defendants' motions because the identified storm water runoff from defendants' forestry roads does not violate section 301(a) of the CWA. 33 U.S.C. § 1311(a). First, only "point sources" are subject to the prohibition of section 301(a), and EPA has defined surface drainage or natural runoff from forestry roads as "nonpoint sources" in its regulations at 40 C.F.R. § 122.27. Second, even supposing there are certain point source discharges of storm water from the forestry roads at issue here, neither the statute nor EPA's storm water regulations require such dischargers to obtain an NPDES permit.

II. INTEREST OF THE UNITED STATES

The United States Environmental Protection Agency ("EPA") is the primary agency entrusted by Congress with the responsibility for implementing and enforcing the CWA.[2] 33 U.S.C. §§ 1251-1387. This includes the authority to promulgate regulations. *See* 33 U.S.C. § 1361 (providing that "the Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter"). EPA has a strong interest in this case because it necessarily involves the interpretation of multiple EPA regulations, especially its "silvicultural point source" rule at 40 C.F.R. § 122.27 and its "Phase I" and "Phase II" storm water rules at 40 C.F.R. § 122.26. The United States thus files this *amicus* brief to provide EPA's interpretation of the

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[2] The Secretary of the Army, acting through the U.S. Army Corps of Engineers, administers the section 404 permitting program, with EPA retaining a significant role. *See* 33 U.S.C. § 1344.

relevant Clean Water Act implementing regulations. It is the United States' position that forestry roads like those at issue in this case are not required to secure NPDES permits under a proper construction of section 402 of the CWA. A contrary determination would have significant implications for EPA. In addition, agencies of the United States that construct and maintain forestry roads, such as the U.S. Forest Service within the Department of Agriculture and the Bureau of Land Management within the Department of Interior, also have interests that might be implicated by this case.

The United States has not previously participated in this case. As such, this brief relies on the facts as presented by the parties in their pleadings.

III. STATUTORY AND REGULATORY BACKGROUND

The Federal Water Pollution Control Act, commonly called the Clean Water Act, "is a comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *PUD No. 1 of Jefferson County v. Washington Dep't. of Ecology*, 511 U.S. 700, 704 (1994) (citing 33 U.S.C. § 1251(a)). Section 301(a) of the Clean Water Act ("CWA" or the "Act") prohibits the "discharge of any pollutant" by any person into waters of the United States except in compliance with certain enumerated provisions, among them section 402.[3] 33 U.S.C. § 1311(a). Section

[3] Under the section 402 NPDES program, EPA may issue permits to authorize point source discharges on the condition that the discharges will meet other specified applicable requirements. 33 U.S.C. § 1342(a). In addition, States may administer their own NDPES permit programs for discharges if EPA de-

502(12) defines the term "discharge of a pollutant" to mean any addition of any pollutant to a navigable water from any "point source." 33 U.S.C. § 1362(12). Section 502(14) defines the term point source to mean:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). The original 1972 CWA arguably required all point source dischargers to secure an NPDES permit in order to be "in compliance" with section 402. *See NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In response to this decision, however, Congress amended the Act in 1987 to add section 402(p), which lists five categories of storm water point sources that must be regulated under the NPDES program, and explicitly authorizes EPA to determine whether or not to regulate other storm water point sources. *See* 33 U.S.C. § 1342(p).

A. The Point Source/Nonpoint Source Distinction and EPA's "Silvicultural Point Source" Regulations at 40 C.F.R. § 122.27.

Under the Clean Water Act, all sources of pollution that are not point sources are "nonpoint sources"

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termines that the program meets specified requirements. 33 U.S.C. § 1342(b). Upon approval of a State program, EPA will suspend its issuance of permits under section 402(a).

(NPS).[4] Several sections of the Act provide that EPA is to address nonpoint sources through non-regulatory programs. Section 208 established an "areawide waste treatment management program" to address, among other things, nonpoint sources. *See* 33 U.S.C. § 1288. Section 304(f) requires the Administrator to issue "information, including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from - (A) agricultural and silvicultural activities, including runoff from fields and crops and forest lands . . . ." 33 U.S.C. § 1314(f). Congress also added section 319 to the Act in 1987 authorizing a federal grant program to address nonpoint sources.[5] *See* 33 U.S.C. § 1329.

Pursuant to its responsibilities under the CWA to address both point and nonpoint sources of pollution, EPA has promulgated a "silvicultural point source" regulation defining those silvicultural activities that constitute point sources and those that con-

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[4] While the Act does not expressly define the term nonpoint sources, the Ninth Circuit has construed this term to refer to "pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 849 n.9 (9th Cir. 1987) [hereinafter "*ONRC*"]; *see also National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982) (construing the term "nonpoint sources" as a residual category consisting of sources other than point sources).

[5] While the Ninth Circuit has recognized that nonpoint sources "constitute a major source of pollution in the nation's waters," the court also explained that the statute deals with nonpoint sources through non-regulatory programs, not through permitting. *ONRC*, 834 F.2d at 849. Thus, Congress did not intend to subject every source of pollution to a permitting regime.

stitute nonpoint sources. *See* 40 C.F.R. § 122.27. While EPA's current silvicultural point source regulation was adopted in 1980, EPA first adopted a rule regarding pollution from silvicultural activities in 1973. The 1973 rule broadly exempted all silvicultural storm water discharges from the NPDES program, unless EPA or a state permitting agency identified a particular silvicultural activity "as a significant contributor of pollution." 38 Fed. Reg. 18,000, 18,004 (July 5, 1973) (*codified at* 40 C.F.R. § 125.4(j)). The District Court for the District of Columbia overturned this rule in 1975. *See NRDC v. Train*, 396 F. Supp. 1393, 1395 (D.D.C. 1975), *aff'd sub nom*, *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In response, EPA promulgated new silvicultural regulations in 1976 identifying four categories of silvicultural point sources and including a comment providing several examples of silvicultural nonpoint sources. *See* 41 Fed. Reg. 24,709, 24,711 (June 18, 1976) (originally codified as 40 C.F.R. § 124.85). EPA promulgated these regulations in their current form in 1980. *See* 45 Fed. Reg. 33,290, 33,446-47 (May 19, 1980). The current regulation provides, in pertinent part, as follows:

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include non-point source silvicultural activities such as . . . harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.*

40 C.F.R. § 122.27(b) (emphasis added).

B. The Clean Water Act's Regulation of Storm Water under Section 402(p)

Section 402 of the CWA, as originally enacted in 1972, did not treat storm water point sources any differently from other point source discharges. In 1987, however, Congress added section 402(p) to the Act specifically to address storm water pollution. *See* Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7. Section 402(p) sets forth specific requirements and schedules for the regulation of storm water point source discharges, establishing a two-step process for addressing storm water pollution. *See* 33 U.S.C. § 1342(p). The two regulatory steps are commonly referred to as "Phase I" and "Phase II." *See Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 328 (D. Vt. 2004), *aff'd*, 139 Fed. Appx. 3381 (2d Cir. 2005) [hereinafter "*CLF*"] (discussing Phase I and Phase II). As the district court explained in *CLF*, storm water discharges not regulated by either Phase I or Phase II are excluded from the need to secure an NPDES permit unless EPA (or a state) specifically designates a particular facility as requiring a permit. *Id.* at 330-33.

1. Phase I of the storm water regulatory program.

Section 402(p)(1) imposed a general moratorium on the issuance of NPDES permits to discharges composed entirely of storm water until October 1, 1994,[6] except for discharges identified in Section

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[6] As originally enacted, the Water Quality Act of 1987 extended the permitting moratorium to October 1, 1992. The Water Resources Development Act of 1992, Pub. L. No. 102-580, 106

402(p)(2). 33 U.S.C. § 1342(p)(1). Section 402(p)(2) identified five classes of discharges composed entirely of storm water that were exempted from the section 402(p)(1) permitting moratorium. 33 U.S.C. § 1342(p)(2). These five categories comprise the Phase I discharges.[7] Congress expressly required NPDES permits for these storm water discharges in section 402(p)(3) and directed EPA to promulgate appropriate regulations in section 402(p)(4). EPA promulgated the Phase I regulations in 1990. *See* 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R §§ 122.26(a)(1)(i) (a)(1)(iv)). The Ninth Circuit largely upheld these regulations as a valid exercise of EPA authority. *See American Mining Congress v. EPA*, 965 F.2d 759 (9th Cir. 1992); *Natural Resources Defense Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992).

2. Phase II of the storm water regulatory program.

In section 402(p)(5) of the Act, Congress directed EPA, in consultation with the states, to conduct a study for the purposes of identifying "stormwater

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Stat. 4797, 4862 (1992), then extended the moratorium to October 1, 1994.

[7] The five classes of "Phase I" discharges are as follows: "(1) a discharge for which a [NPDES] permit has been issued before February 4, 1987; (2) a discharge associated with an industrial activity; (3) a discharge from a municipal separate storm sewer system serving a population of 250,000 or more ["large MS4s"]; (4) a discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000 ["medium MS4s"]; and (5) a discharge for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2).

discharges or classes of stormwater discharges for which permits [were not yet] required... ; determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality." 33 U.S.C. § 1342(p)(5). Section 402(p)(6) further required that, based on the results of the 402(p)(5) study, EPA shall:

> issue regulations . . . which designate storm water discharges, other than those discharges described in [section 402(p)(2)] to be regulated to protect water quality, and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

33 U.S.C. § 1342(p)(6).

On December 8, 1999, EPA issued the final Phase II storm water regulations required by section 402(p)(6). *See* 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999). EPA's Phase II rules designate two additional categories of storm water discharges that are to be "regulated to protect water quality." 40 C.F.R. § 122.26(a)(9)(i). These two categories of discharges are: (1) municipal separate storm sewer systems (MS4s) serving less than 100,000 persons; and (2) construction sites that disturb one to five acres of land. *Id.* EPA did not designate any other source categories in this rule, meaning anything beyond the

source categories in Phase I and Phase II would ordinarily not need an NPDES permit. However, as noted earlier, EPA did retain the authority (both for itself and state NPDES permitting agencies) to subsequently designate sources on a case-by-case basis as requiring an NPDES permit where the permitting agency determines that: (1) storm water controls are needed based on wasteload allocations contained in total maximum daily loads (TMDLs), 40 C.F.R. § 122.26(a)(9)(i)(C); or (2) the discharge or category of discharges contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States, 40 C.F.R. § 122.26(a)(9)(i)(D).

EPA's Phase I and Phase II regulations have largely withstood judicial scrutiny. In *Environmental Defense Center v. EPA.*, 344 F.3d 832 (9th Cir. 2003) [hereinafter "*EDC*"], *cert. denied, Texas Cities Coalition on Stormwater v. EPA*, 541 U.S. 1085 (2004), the Ninth Circuit upheld EPA's Phase II regulations against various challenges in all respects except two. First, the court found that public notice and comment is required for "notices of intent" seeking coverage under the general permit issued for small MS4s. Second, the court ordered EPA to "consider in an appropriate proceeding the Environmental Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads." *Id.* at 879. The court found that, in promulgating the Phase II regulations, EPA had not adequately responded to comments asserting that section 402(p)(6) compels EPA to require NPDES permits for storm water discharges from forest roads. *Id.* at 861. While the court remanded a portion of the Phase II rule to EPA for a substantive explanation of its decision, it neither vacated the Phase II rules nor suggested an outcome for the re-

mand. In fact, the Ninth Circuit expressly recognized EPA's authority to decide not to regulate forestry roads under the NPDES permitting program. *Id.* at 844.

In summary, the Phase I and Phase II storm water programs, which the Ninth Circuit has sustained, collectively impose permitting obligations on the following: (1) small, medium and large municipal separate storm sewer systems (MS4s); (2) storm water discharges associated with industrial activity; and (3) storm water discharges from construction sites disturbing one or more acres. *See* 40 C.F.R. § 122.26(a) - (b). In addition, EPA and authorized state agencies retain residual authority to designate additional discharges for inclusion in the NPDES permit program in prescribed circumstances. *See* 40 C.F.R. § 122.26(a)(9)(C)-(D). Accordingly, storm water discharges that do not fall within one of these categories are not required to obtain NPDES permits.

IV. ARGUMENT

This case turns on the application of two sets of EPA's regulations: one that defines the dividing line between point and nonpoint sources of pollution related to silviculture (40 C.F.R. § 122.27), and one defining which storm water discharges are subject to the NPDES permitting requirement (40 C.F.R. 122.26). The plain language of EPA's silviculture regulations, promulgated over thirty years ago, exclude runoff from forest roads from the requirement to obtain an NPDES permit. Also, through a series of rulemakings addressing storm water discharges, EPA has chosen not to subject such runoff to regulation under the agency's storm water permitting program.

In this citizen suit, NEDC has not challenged the validity of those regulations, nor could it do so. Because those regulations were subject to review under section 509(b)(1) of the Act,[8] the statute expressly precludes their being reviewed in this proceeding. 33 U.S.C. § 1369(b)(2). Under section 509 of the CWA, Congress expressly mandated that suits challenging regulations may be brought solely in the Courts of Appeals within a specified period of time, which has long since past.

Therefore, the sole issue to be decided by this Court is whether the runoff from forestry roads that are the subject of this lawsuit require NPDES permits under the applicable EPA regulations. As explained below, the plain language, administrative history, and governing judicial decisions all make clear that run-off from forestry roads are not subject to the NPDES permitting requirement for two independent reasons: (1) they constitute nonpoint source pollution under 40 C.F.R. 122.27; and (2) they are not among the categories of storm water discharges requiring permits under 40 C.F.R. 122.26. NEDC's complaint plainly misinterprets EPA's regulations in arguing that such runoff requires NPDES permits.

Finally, the very issues in this case are presently pending before the Agency in a remand from the Ninth Circuit. *See EDC*, 344 F.3d at 879. In that remand, EPA is evaluating the applicability of the

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[8] Section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), provides for review in the United States Court of Appeals of the regulations governing the issuance of permits under section 402. *NRDC v. EPA*, 656 F.2d 768, 775 (D.C. Cir.1981); *cf. E.I. du-Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977) (reviewing regulations issued under CWA section 301).

storm water permitting program to runoff from forest roads. As explained below, the terms of the Ninth Circuit remand make clear that, under current regulations, such runoff is not subject to the NPDES permitting requirement. As part of EPA's evaluation, the agency is considering whether storm water discharges from forest roads should be part of the comprehensive regulatory program under section 402(p)(6), and if so, what type of further actions are warranted.

A. EPA's Silvicultural Point Source Regulation Defines Discharges from Forestry Roads as Nonpoint Sources, thus Excluding them from the NPDES Permitting Program.

CWA sections 208, 301(a), 304(f), 319, 402, 501(a) and 502(14) authorize EPA to promulgate regulations defining the line between point source and nonpoint source pollution with respect to forestry activities.[9] *See* 33 U.S.C. §§ 1288, 1311(a), 1314(f),

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[9] For example, section 304(f) of the CWA required EPA to issue "guidelines for identifying and evaluating the nature and extent of *nonpoint sources of pollutants*" and to address methods to control pollution resulting from "*agricultural and silvicultural activities, including runoff from fields and crops and forest lands*." 33 U.S.C. § 1314(f)(emphasis added). Section 208 of the Act also required EPA to support the states in developing "a process to (i) identify, if appropriate, agriculturally and *silviculturally related nonpoint sources of pollution*, ... , and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F)(emphasis added). Congress added section 319 to the Act in 1987, which required each state to prepare a management program for nonpoint sources and authorizes a federal grant program to address pollution from these sources. *See* 33 U.S.C. §§ 1329(b)(1), 1329(h).

1329, 1342, 1361(a), 1362(14). Pursuant to these statutory grants of authority, EPA promulgated its "silvicultural point source" regulation in 1980. *See* 45 Fed. Reg. at 33,446-47 (codified at 40 C.F.R. § 122.27). These regulations define surface drainage or natural runoff from forestry roads as a nonpoint source that is not subject to the NPDES permitting program.

1. EPA's Silvicultural Point Source Regulation at 40 C.F.R. § 122.27 defines storm water from forestry roads as a nonpoint source.

For over thirty years, EPA has consistently interpreted both the Clean Water Act and its implementing regulations to define discharges from forestry roads as nonpoint sources. Starting in 1973, EPA issued a report on silvicultural activities, noting generally that "pollution from forests is nonpoint in origin, and defies control or treatment in the conventional sense." *See Processes, Procedures, and Methods to Control Pollution Resulting from Silvicultural Activities*, EPA 430/9-73-010 (Oct. 1973); 38 Fed. Reg. 29,109 (Oct. 16, 1973) (excerpts attached as Exhibit A). Consistent with this conclusion, EPA originally promulgated regulations that did not distinguish between silvicultural point and nonpoint sources, but noted that such forestry activities need not secure permits unless a specific source or category was designated for regulation by EPA. As noted above, these regulations were invalidated.[10] *See NRDC v. Costle*, 568 F.2d 1369.

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[10] However, in invalidating these regulations, the district court in *NRDC v. Train* noted that "NRDC does not contend that every farm ditch, water bar, *or culvert on a logging road* is

The Court in *NRDC v. Costle* found that once EPA defined a discharge as a "point source," it had to regulate that source, but noted that EPA does have authority to exclude some sources from regulation by defining them as "nonpoint sources." *Id.* at 1377. EPA then adopted revised regulations in 1976 identifying four silvicultural activities as point sources. This rule included a comment as part of the regulation explaining that the definition of silvicultural point source "does not include nonpoint source activities inherent to silviculture such as . . . *road construction and maintenance from which runoff results from precipitation events.*" 40 C.F.R. § 125.54 (1976) (emphasis added). When EPA adopted the regulations in their present form in 1980, the agency incorporated the comment from the 1976 rule directly into the body of the definition of "silvicultural point source," slightly modifying the last phrase of the sentence quoted below as follows:

> The term [silvicultural point source] does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, *or road construction and maintenance from which there is natural runoff.*

40 C.F.R. § 122.27(b) (emphasis added).[11] This regulation excludes discharges from silvicultural roads

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properly meant to be a point source under the Act." 396 F. Supp. at 1401 (emphasis added).

[11] EPA also promulgated related regulations clarifying when NPDES permits are not required for silvicultural activities. NPDES permits are not required for "any introduction of pollu-

that are "maintained" in the sense that they are actively in use. The regulation's exclusion of forestry roads from the definition of point source includes "initial transport of forest products from an active harvest site." 60 Fed. Reg. 50,804, 50,835 (Sept. 29, 1995). As explained below, such a long-standing agency interpretation is entitled to substantial deference.

Indeed, the courts have agreed with EPA's construction. In particular, the Ninth Circuit read the above-quoted regulation (section 122.27) to exclude activities such as those at issue here from the definition of "point source" in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1186 (9th Cir. 2002) [hereinafter "*Forsgren*"]. In *Forsgren*, the court heard a challenge to U.S. Forest Service pest control operations, and held that the statutory definition of "point source" in section 502(14) of the CWA "clearly encompasses an aircraft equipped with tanks spraying pesticide from mechanical sprayers directly over covered waters."[12] 309 F.3d at 1185. In so holding, however, the court explained that activities like those at issue here properly constitute nonpoint sources. The court first read the phrase "from which there is natu-

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tants from non point-source agricultural and silvicultural activities, including storm water runoff from . . . forest lands, but not discharges from . . . silvicultural point sources as defined in § 122.27." 40 C.F.R. § 122.3.

[12] In reaching the holding that the CWA definition of point source covered the silviculturally-related pest control activities at issue in that case, the *Forsgren* court read the first sentence of section 122.27 to provide a non-exhaustive enumeration of silvicultural point sources. *Forsgren*, 309 F.3d at 1188, n. 7. This reading of the first sentence of the regulation does not affect the analysis here, however, since it is the court's broad reading of the second sentence that is controlling in this case.

ral runoff' to modify all of the activities listed in the second sentence of the regulation, and proceeded to note that "silvicultural pest control *from which there is natural runoff* would be an example of a 'nonpoint source silvicultural' activity *not* included in the term 'point source.'" *Id.* at 1186 (emphases added). Consequently, under the Ninth Circuit's interpretation of the regulation, forestry roads *from which there is natural runoff* are likewise "nonpoint sources" of pollution. This reading of the regulation is also consistent with the decisions of other courts that have read section 122.27's definition of point sources narrowly - and its illustrative list of silvicultural nonpoint sources broadly. *See Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998); *Sierra Club v. Martin*, 71 F. Supp. 2d 1268 (N.D. Ga. 1996).

Other Ninth Circuit cases further support the treatment of discharges from forestry roads as nonpoint sources. In *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1987) [hereinafter "*ONRC*"], an environmental group challenged a U.S. Forest Service timber sale arguing (among other things) that the nonpoint source pollution created by harvesting activities would cause a violation of Oregon water quality standards. In disposing of this case, the Ninth Circuit noted that the pollution caused by the forestry harvesting activities at issue was from nonpoint sources. *Id.* at 849; *see also Oregon Natural Desert Assoc'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) (noting that "examples of nonpoint source pollution include . . . silvicultural activities").

Nevertheless, NEDC's complaint seeks to distinguish forestry roads from the nonpoint source activities listed in section 122.27. NEDC argues that

"stormwater that is collected, conveyed, and delivered to waters of the United States by ditches, culverts, channels, pipes and other mechanisms ... is not 'natural runoff.'" FAC at ¶68. This assertion is inconsistent with both the Ninth Circuit's reasoning in *Forsgren*, and its assumption in *ONRC* that the forest harvesting activities in that case involved only nonpoint sources. NEDC's reading of the phrase "natural runoff" is also inconsistent with EPA's intended meaning of the phrase.

Throughout the history of its silvicultural point source rule, EPA has employed phrases such as runoff "from precipitation events," runoff "induced by natural processes," and "natural runoff" as interchangeable terms. In fact, in the 1976 rule, EPA used the phrase "from which runoff results from precipitation events," 40 C.F.R. § 125.54 (1976), and contemporaneously explained in the preamble that nonpoint sources are identified by the following three characteristics:

> (i) The pollutants discharged are *induced by natural processes*, including precipitation, seepage, percolation, and runoff; (ii) The pollutants discharged are not traceable to any discrete or identifiable facility; and (iii) The pollutants discharged are better controlled through the utilization of best management practices, including process and planning techniques.

41 Fed. Reg. 24,709, 24,710 (June 18, 1976) (emphasis added). Subsequently, in 1980, EPA used the term "natural runoff" for the first time in its consolidated permit application regulations. *See* 45 Fed. Reg. 33,290, 33,447 (May 19, 1980). In promulgating these rules, EPA inserted the comment from the

1976 regulation into the body of the new rule, and changed the phrase "from which runoff results from precipitation events" to "from which there is natural runoff" without comment. EPA did not intend any substantive change to the regulation. Thus, the term "natural runoff" simply means "runoff from precipitation events."

While NEDC apparently reads the term "natural runoff" to limit the list of nonpoint sources in the second sentence of section 122.27 to pollutant-free runoff flowing over pristine landscapes, such an interpretation would render the second sentence of the rule superfluous because by definition section 301(a) does not apply to unpolluted discharges. Unsurprisingly then, NEDC's interpretation conflicts with Ninth Circuit decisions explaining that "constructions which render regulatory provisions superfluous are to be avoided." *Association to Protect Hammersley v. Taylor Res.*, 299 F.3d 1007, 1018-1019 (9th Cir. 2002) [hereinafter "*Hammersley*"] (*citing Rainsong Co. v. FERC*, 151 F.3d 1231, 1234 (9th Cir. 1998)).

Moreover, NEDC's interpretation of section 122.27 ignores the plain language of the regulation. The regulation refers to "road construction and maintenance." It is practically impossible to construct and maintain a road without including systems for the control of precipitation through ditches, culverts and the like. Otherwise, the roads would wash out. These structures are an integral part of forest roads and reading them as outside the scope of the regulation does not make sense because it defeats the plain language of the regulation.

2. This Court should defer to EPA's reasonable interpretation of its own regulations.

This Court should defer to EPA's interpretation of its own regulations. The Supreme Court has stated that courts are to extend "substantial deference to an agency's interpretation of its own regulations," unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to Secretary of Labor's interpretation of Department of Labor regulations as contained in the *amicus* brief of the United States); *accord Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512-13 (1994) (deferring to Secretary of Health and Human Services' interpretation of a Medicare regulation); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965) (noting that "when the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"). EPA's reading of its "silvicultural point source" regulation warrants the same deference because it is neither "plainly erroneous" nor "inconsistent" with the CWA.

For over thirty years EPA has interpreted multiple iterations of its regulations regarding silvicultural activities to define natural runoff from forestry activities (including roads) as not subject to the NPDES program. Elevated deference is particularly called for where, as here, an agency has "consistently followed" the same interpretation of its regulations. *A&W Smelter and Refiners v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998); *accord McCoog v. Hegstrom*, 690 F.2d 1280, 1284 (9th Cir. 1982). Deference is also appropriate where a court is interpreting complex regulations such as those EPA has promulgated to

administer the CWA. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 n.9 (1980) (stating that deference to an agency's interpretation of regulations is rooted in respect for agency expertise in the area).

Indeed, in a case closely analogous to this one, the Ninth Circuit in *Hammersley* extended just such deference to EPA regulations defining point and nonpoint sources. *See* 299 F.3d at 1018-1019. There the court found that a mussel farm was not a point source by deferring to EPA regulations at 40 C.F.R. § 122.24(a). Because the EPA regulations in *Hammersley* "expressly excluded" facilities such as the one at issue in that case from the definition of point source, the court held that it could not disregard EPA regulations and declare this facility a point source under the statutory definition. The court reasoned that a contrary decision would "undermine the agency's interpretation of the Clean Water Act." *Id.* at 1019. As in *Hammersley*, this Court should defer to the EPA regulations defining point and nonpoint sources.

3. This court should not follow *EPIC*, which misinterprets EPA's regulation and the CWA and failed to give proper deference to the Agency.

NEDC cannot reasonably avoid all of the above-cited controlling precedent by resorting to an incorrectly decided district court opinion, *Environmental Protection Information Center v. Pacific Lumber Company*, 301 F. Supp. 2d 1102 (N.D. Cal. 2004) [hereinafter "*EPIC*"]. In *EPIC*, the district court declined to defer to EPA, and held that the forestry roads at issue in that case entailed point source discharges because they involved "the kind of conduits and channels embraced by section 502(14) ... and sec-

tion 122.27 does not - and cannot - absolve silvicultural business of CWA's 'point source' requirements." *Id.* at 1113. But *EPIC* was incorrectly decided. *EPIC* is in direct conflict with *Hammersley* and the other cases cited in this section above, because the *EPIC* court declined to extend any deference to EPA's interpretation of its silvicultural point source regulations. Furthermore, *EPIC* conflicts with *Forsgren's* reading of the regulation and is in tension with the Ninth Circuit's assumption in *ONRC* that silvicultural harvesting entails nonpoint sources. *See* discussion *supra* at 14-15.

The court in *EPIC* also failed to give proper deference to EPA's interpretation of the CWA as reflected by the agency's section 122.27 regulation. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court explained that an agency action filling a "gap" left by a statute for the agency to fill should be upheld as long as it is both consistent with the language of the statute and reasonable.[13] *Id.* at 842-844. EPA's interpretation of the CWA in section 122.27 merits deference because Congress authorized EPA to fill such a "gap" in the CWA statutory framework. *See Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) (noting that EPA's interpretation should be upheld as long as it "is a sufficiently ra-

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[13] The Court explained that where Congress "explicitly" leaves "a gap for the agency to fill ... legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute" and that where such a delegation is implicit instead of explicit "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844.

tional one to preclude a court from substituting its judgment for that of EPA."); *accord EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83-84 (1980).

In particular, sections 304(f) and 208 of the Act require EPA to identify when silvicultural activities involve "point sources" and when they involve "nonpoint sources." Section 304(f) required EPA to issue "guidelines for identifying and evaluating the nature and extent of *nonpoint sources of pollutants*" and to address methods to control pollution resulting from "*agricultural and silvicultural activities, including runoff from fields and crops and forest lands.*"[14] 33 U.S.C. § 1314(f)(emphasis added). Section 208 of the Act also required EPA to support the states in developing "a process to (i) identify, if appropriate, agriculturally and *silviculturally related nonpoint sources of pollution*, ..., and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F)(emphases added). Therefore, to comply with these mandates, EPA must distinguish the nonpoint sources that are to be addressed through section 304(f) guidelines and section 208 control strategies from the point sources that require permitting under the NPDES program.[15]

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[14] EPA began making these determinations with respect to silvicultural activities in 1973, one year after enactment of the CWA, when it published its 1973 Silvicultural Activities Report. *See* discussion *supra* at 12.

[15] The legislative history of the Act also suggests that Congress intended EPA to promulgate regulations defining point and nonpoint source pollution, especially in connection with agricultural and silvicultural activities. The House Report to the 1972 Act noted that "[t]he Committee . . . expects the Administrator to be most diligent in gathering and distribution of the guide-

Critically as well, the definition of "point source" in section 502(14) of the Act leaves EPA with discretion to define the line between point source and nonpoint source discharges. Courts have so recognized. In *Forsgren*, for example, the Ninth Circuit acknowledged that "EPA has some power to define point source and nonpoint source pollution *where there is room for reasonable interpretation of the statutory definition*." 309 F.3d at 1190 (emphasis in original). The D.C. Circuit similarly explained that the definition of point source leaves room for "some exclusion [from the NPDES program] by interpretation." *NRDC v. Costle*, 568 F.2d at 1377; *see also National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982) (noting that Congress meant for EPA to have "at least some power" to define the term "point source").

In summary, unlike the district court in *EPIC*, this court should defer to both EPA's interpretation

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lines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution *from such nonpoint sources as agricultural and silvicultural activities*." H.R. Rep. No. 92-911, at 109 (1972) (emphasis added); *see also* 117 Cong. Rec. 38,816 (1971) (statement of Sen. Muskie) ("Guidance with respect to the identification of 'point sources' and 'nonpoint sources,' especially as related to agriculture, will be provided in regulations and guidelines of the Administrator"). When adding section 319 to the statute in 1987, Congress specifically recognized silvicultural roads and culverts as nonpoint sources. The Senate Report accompanying S. 1128, an earlier version of the 1987 bill, recognized that the "best management practices" that could be included in a state's section 319 program include "reducing runoff from ... *silvicultural areas (e.g., careful road placement, culverting, grassing of abandoned roads and skid trails*." Leg. Hist. Of Water Quality Act of 1987 (Vol. 2) 1420, 1456; Senate Report 99-50 at 35-36 (May 14, 1985) (emphasis added).

of its section 122.27 rule, and the rule itself, and should not substitute its judgment for that of the EPA.

B. EPA Has Chosen Not to Regulate Point Source Discharges from Forestry Roads Under Section 402(p) Of The CWA.

On top of all this, precipitation-driven discharges from the forestry roads at issue in this case, including discharges through ditches and culverts, do not violate the Clean Water Act because these discharges are excluded from the permitting program under section 402(p) of the CWA. First, runoff that is generated by precipitation and channeled by forestry roads is properly analyzed under 402(p) because it is a form of storm water.[16] Second, even supposing that there are point source discharges at issue in this case, any such discharges are not subject to the NPDES permitting requirements under EPA's storm water program. Therefore, any point source discharges associated with forestry roads are in compliance with section 402, and are not unlawful under section 301(a).

1. Storm water from forest roads is not covered by section 402(p)(2) and EPA's Storm Water regulations.

NEDC cannot squeeze "forestry roads" into EPA's storm water regulations. Under a plain read-

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[16] NEDC's complaint makes no suggestion to the contrary. Also, while the term "storm water discharge" is not defined in the Act, the ordinary meaning of the term "storm water" is precipitation-driven runoff. EPA regulations define the term "storm water" accordingly as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

ing of section 402(p) and EPA's implementing regulations, the storm water discharges at issue here are not required to obtain NPDES permits because: (1) they do not fall within the five "Phase I" categories expressly designated by Congress to receive NPDES permits under section 402(p)(2); (2) they are not included within the two additional categories promulgated by EPA in its "Phase II" regulations, *see* 40 C.F.R. § 122.26(a)(9)(I); and (3) they have not been designated for NPDES permits either individually or categorically under the statutory and regulatory residual designation authorities, *see* 402(p)(2)(E) and 40 C.F.R. § 122.26(a)(9)(i)(C) & (D).

The Ninth Circuit has recognized the limited scope of section 402(p)'s permitting requirements. In 1999, EPA exercised its broad authority under sections 402(p)(5) and 402(p)(6) of the CWA to promulgate the Phase II rules, in which EPA required NPDES permits for some, but by no means all, storm water point sources. *See* 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999) (preamble to Phase II storm water regulations noting that the rules excluded millions of storm water discharges from coverage under the NPDES program). Among the categories that EPA expressly chose not to include in the Phase II rules was forestry roads. In *EDC*, environmental groups challenged EPA's Phase II regulations arguing that the rule wrongly failed to require NPDES permitting of storm water discharges from forestry roads. *See* 344 F.3d at 861. While the court remanded the rules to EPA to explain *why* the agency chose not to regulate runoff from forestry roads under Phase II, the court upheld EPA's authority to regulate less-than-all remaining point source storm water discharges under section 402(p)(6), stating as follows:

> EPA was free to adopt any regulatory program, including a permitting program, that included . . . [specific] elements. It is more reasonable to interpret congressional silence about permits as an indication of EPA's flexibility not to use them than as an outright prohibition.

Id. at 844 (citation omitted). The court also upheld EPA's residual designation authority. *See* 344 F.3d at 875-6. This authority would not have been necessary if *all* remaining point source discharges of storm water automatically required permits.[17]

Likewise, in *CLF* the U.S. District Court for Vermont found that section 402(p) exempts numerous storm water discharges. *CLF*, 327 F. Supp. 2d 325. This decision was affirmed by the U.S. Court of Appeals for the Second Circuit. *See CLF*, 139 Fed. Appx. 3381 (2d Cir. 2005). In reaching this holding, the court looked to both the plain language of the section as well as to the legislative history to find it "replete with evidence that Congress was concerned with the overwhelming and unnecessary regulation created by the absolute prohibition on all stormwater

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[17] As already noted above, the Ninth Circuit only remanded the regulation to EPA to explain its decision not to regulate forestry roads: it did not vacate EPA's Phase II regulations. Thus, EPA's Phase II regulations are still valid, and these rules do not subject to the NPDES permitting requirements any storm water discharges from forestry activities not included in the section 122.27 definition of "silvicultural point source."

discharges that existed before the enactment of the Water Quality Act."[18] *Id.* at 332.

Nevertheless, in this case NEDC asserts that forestry roads are already included within discharges "associated with industrial activity," which is one of the five original Phase I categories for which Congress required NPDES permits. 33 U.S.C. § 1342(p)(2)(B). NEDC argues that the term "industrial activity," as defined at 40 C.F.R. § 122.26(b)(14), includes facilities classified under Standard Industrial Classification code ("SIC code") 24. FAC, ¶53. NEDC then argues that logging roads are properly classified as SIC code 2411, which is a subcategory of SIC 24. *Id.* NEDC's argument thus turns on the proper interpretation of the term "industrial activity" in EPA's Phase I regulations; on the placement of forestry roads in the SIC Codes; and on the role of the regulatory language excluding activities. *See* 40 C.F.R. § 122.26(b)(14). But EPA never contemplated that forestry roads would be included within the industrial activities subject to the Phase I regulations.

First, the plain language of the regulatory definition, read as a whole, does not support a reading of the phrase "stormwater discharge associated with industrial activity" to include forestry roads. The first sentence of the definition limits this term to "the discharge from any conveyance that is used for collecting and conveying stormwater and that is *directly* related to *manufacturing, processing, or raw materials storage areas at an industrial plant.* 40

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[18] Of course, this "absolute prohibition" on storm water discharges only referred to "point source" storm water discharges, which did not include exempted forestry activities.

C.F.R. § 122.26(b)(14) (emphases added). The forestry roads at issue in this case are not "industrial activities" within the traditional sense of this definition, because they are not "directly related" to activities associated with an "industrial plant" under any plain language reading of the regulation.[19] The preamble to the 1990 regulations also underscores the link between the Phase I storm water permitting requirements and industrial facilities, explaining that the "[e]stablishments identified under SIC 24 (except 2434) are engaged in operating sawmills, planning mills and other mills engaged in producing lumber and wood basic materials."[20] 55 Fed. Reg. at 48,008.

Second, contrary to NEDC's argument, EPA never contemplated that the forestry roads at issue in this case would fit within SIC code 24 (Lumber and Wood). Forestry roads are inherently multi-purpose and serve several activities that fall within both SIC code 8 (Forestry) and SIC code 24 (which includes "logging activities"). *See* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987) at 35, 107 (excerpts attached as Exhibit C). For example, even a

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[19] EPA has categorized discharges from abandoned mines as ones "associated with industrial activity" under its Phase I regulations, and the Ninth Circuit upheld EPA's decision to do so in *American Mining Congress v. EPA*, 965 F.2d 759. Forestry roads and silvicultural harvesting, however, are unlike mining activities and more closely resemble agricultural land uses than industrial ones.

[20] Also, nothing in EPA's Phase I regulation of activities within SIC code 24 suggests that the agency intended this section to address runoff from roads used for purposes outside of SIC code 24.

road used primarily for logging will inevitably also be used before, after, and during harvesting activities to support activities that fall within SIC code 8, such as SIC code 811 ("establishments primarily engaged in operation of timber tracts or tree farms for purposes of selling timber") and SIC code 851 ("forestry services"). *Id.* at 35. These SIC code 8 activities include cruising timber, fire prevention, firefighting, pest management, and reforestation activities. *Id.* Finally, most forestry roads also serve recreational purposes. *See, e.g.*, FAC at ¶ 2 (suggesting that the Sam Downs Road provides access to the "Mapes Creek boat ramp"). Therefore, on balance, forestry roads fit best within SIC code 8.[21]

Third, even assuming *arguendo* that forestry roads fit within SIC Code 24, such activities are still excluded from the program by effect of EPA's silvicultural point source regulation. EPA's Phase I storm water rule provides that the regulation "does not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). In promulgating this rule, EPA expressly noted that "the definition of 'storm-water discharge associated with an industrial activity' does not include sources that may be included under SIC 24, but which are excluded under 40 C.F.R. 122.27." *See* 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990). As explained in detail in section A of this brief above, EPA has long viewed runoff from forestry

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[21] Because logging roads are not properly classified in SIC code 24, the further question of what particular tree cutting or processing activities are encompassed by the inclusion of "logging activities" in SIC code 24 is not presented in this case. In any event, most such activities will not involve point sources, as set forth in EPA's silvicultural point source rule.

roads as excluded under 40 C.F.R. § 122.27. Thus, even supposing forestry roads do fall within SIC Code 24, this Court should defer to EPA's long-standing interpretations of both its storm water rule and its silvicultural point source rule.

EPA confirmed that forestry roads are not covered by the Phase I regulations in a 1995 report to Congress on its Phase II Storm Water study, explaining that the NPDES regulations specifically exempt "runoff from agricultural and silvicultural activities (mostly within SIC codes 01-09)." EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program, Report to Congress*, at 2-23, n.8 (March 1995) (excerpts attached as Exhibit B).[22] This report discusses those timber product facilities that are point sources within the Phase I regulations, but never mentions silvicultural harvesting or road construction or maintenance activities. *Id.* at E2-E3.

Most importantly, the history of judicial review of EPA's Phase II regulations strongly suggests that the Phase I regulations do not cover discharges associated with forestry roads. Section 402(p)(6) of the CWA required EPA to promulgate the Phase II regulations, and EPA adopted these rules on December 18, 1999. *See* 64 Fed. Reg. 68,722 (codified at 40 C.F.R. §§ 9, 122, 123 and 124). As discussed in detail below, the Ninth Circuit later remanded portions of

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[22] EPA's 1995 Phase II Report to Congress is entitled to deference according to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncement, and all those factors which give it power to persuade . . . ." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

these rules to EPA to determine whether "§ 402(p)(6) requires EPA to regulate forestry roads." *EDC*, 344 F.3d at 863. Obviously, if forestry roads were already covered by Phase I, this remand would have been unnecessary.

In summary, the United States reaffirms its interpretation of EPA's storm water regulations to exclude forestry road construction and maintenance activities. EPA's interpretation of the storm water rules, as contained in this *amicus* brief, is entitled to deference. *See Auer*, 519 U.S. at 461.

2. In the EPIC case, the Northern District of California wrongly interpreted section 402(p) in direct conflict with the Ninth Circuit's decision in EDC.

For all of the reasons presented above, storm water discharges from forestry roads are not covered by either EPA's Phase I or Phase II regulations. Once again, the only precedent to support NEDC's argument is *EPIC*, 301 F. Supp. 2d 1102. But, the *EPIC* court misapplied section 402(p) of the CWA. *EPIC*'s reading of section 402(p) contradicts both the plain language of the statute, and the Ninth Circuit's decision in *EDC*, 344 F.3d 832.

In *EPIC*, the court cited two reasons for its holding that section 402(p) did not apply to the discharges from forestry roads at issue in that case. First, the court found that these discharges did not consist "'entirely' of storm water." 301 F. Supp. 2d at 1111. In making this finding, the court referred to the fact that the *EPIC* complaint alleged that the defendants discharged "storm water and *pollutants*" from point sources. *Id.* (emphasis in original).

Second, the court found that in order for section 402(p) to apply, the discharges must have been "'unregulated'—both as a matter of time and a matter of law—at the time of the 1987 amendments." *Id.* The court then reasoned that since the forestry road discharges at issue there were considered point sources in 1987, they could not be considered "unregulated" for purposes of section 402(p). These rulings misconstrue the purposes and meaning of section 402(p) and directly conflict with the Ninth Circuit's *EDC* decision upholding in nearly all respects EPA's Phase II storm water regulations.

With respect to the court's first threshold question—whether the forestry road discharges at issue in that case were composed entirely of storm water—the court appeared to find that section 402(p) applies, as a matter of law, only if a storm water discharge contains no pollutants. This finding misreads the requirements of the Clean Water Act. *See, e.g.*, *EDC*, 344 F.3d at 842 ("[t]he CWA clearly acknowledges that stormwater, by its nature, is often polluted"). First, the CWA clearly states that there must be an "addition of a pollutant" for a discharge to be subject to regulation. *See* 33 U.S.C. §§ 1311(a), 1362. This principle is also recognized in section 402(a), which authorizes issuance of permits "for the discharge of pollutants," and in section 402(p)(5), which requires EPA to study the sources of and "the extent of pollutants" in storm water discharges. 33 U.S.C. §§ 1342(a), 1342(p)(5). As EPA made clear in response to comments on the definition of storm water contained in its Phase I storm water regulations, "the entire thrust of today's regulation is to control *pollutants* that enter receiving water *from storm water conveyances*." 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (emphasis added). Thus, the phrase

in section 402(p)(1)—"discharges composed entirely of stormwater"—simply cannot support the reading apparently assigned by the *EPIC* court.

Indeed, rather than referring to the absence of pollutants, the phrase "composed entirely of stormwater" refers to the absence of non-storm water discharges, such as discharges from sanitary sewers and industrial processes. *See* 55 Fed. Reg. at 47,995. Thus, a discharge composed "entirely of stormwater" is one that is not intermingled with other waste streams, such as "process wastewater" discharges from industrial operations. *See, e.g.*, 40 C.F.R. § 430.01(m) (defining "process wastewater" as "any water that, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product."). Thus, the phrase "composed entirely of stormwater" is similar in meaning to the term "natural runoff in section 122.27. Also, as discussed above, EPA's interpretation of the phrase "composed entirely of storm water discharges" is entitled to substantial deference. *See Auer*, 519 U.S. at 461. Nonetheless, the *EPIC* court inexplicably neglected to address these basic tenets of administrative law, and failed to accord EPA any deference.

With respect to the court's second threshold test—whether the discharges at issue are "unregulated"—the *EPIC* court found that any point source that was required to obtain an NPDES permit prior to the 1987 amendments is not the kind of previously 'unregulated' category at issue in the Phase II regulations. *See EPIC*, 301 F. Supp. 2d 1112. However, all storm water point source discharges were required to secure an NPDES permit prior to the 1987

amendments. Thus, *EPIC's* interpretation effectively reads section 402(p) out of the CWA.

Prior to the 1987 amendments, the requirement that all point source discharges of storm water secure NPDES permits created problems recognized by Congress in 1987. Since up to that time neither EPA nor approved states had been able to issue permits to the millions of sources technically required to obtain them under the then-existing section 402 of the CWA, the purpose of the 1987 amendments was to address precisely this problem by excluding many point sources from the program.[23] Congress thus put

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[23] See, for example, the statement of Representative Rowland:

> In particular, I want to express my appreciation for the chairman's willingness to incorporate the recommendations I had made during the committee process to address the dilemma in issuing permits ad infinitum for common stormwater discharges.
>
> Under existing law, the Environmental Protection Agency must require National Pollutant Discharge Elimination System (NPDES) permits for anyone who has stormwater runoff on their property. What we are talking about is potentially thousands of permits for churches, schools, residential property, runoff that poses no environmental threat and does not warrant the expense and dilution of personnel and resources that would be required to permit and monitor these harmless discharges.
>
> It was not the intent of Congress that permits be required for every case of stormwater runoff, but due to recent court decisions mandating such extensive permitting, EPA must have the statutory authority to inject some reason back into this process.

131 Cong. Rec. H5993, H5997 (July 22, 1985) (statement of Rep. Rowland). Further, as Rep. Hammerschmidt noted:

> The new language will properly reduce the universe of permits required for storm water from millions to thousands

into effect the two-phased permitting scheme discussed above, which required EPA first to require NPDES permits for the most significant sources of storm water identified in section 402(p)(2) and to then study the remaining sources of storm water to determine which additional sources needed to be regulated "to mitigate impacts on water quality," and by what means. 33 U.S.C. § 1342(p)(5)-(6). In identifying such remaining sources—*all* of which required NPDES permits under the CWA prior to the 1987 amendment—EPA estimated there were more than 7.7 million total sources of point sources of storm water, only 1.5 million of which were accounted for in the identification of all Phase I facilities plus the facilities in the principal groups of additional sources EPA *considered* for coverage in the Phase II regulations. *See* EPA's March 1995 Report to Congress, at 4-21 (excerpts attached as Exhibit B). Relying on the results of this study and on other EPA analyses, the agency issued final Phase II storm water regulations additionally designating two categories of storm water sources for coverage under Phase II.

We also noted that, in addition to authorizing the agency to decide *whether* to regulate particular storm water sources under Phase II, section 402(p)(6) also authorizes EPA to decide *how* to regulate the sources it chose to include in Phase II. Nothing in that sec-

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without reducing the protection of the environment. We established a mechanism that will require permits only where necessary-rather than in every instance. Without these changes, local, State, and Federal officials would be inundated with an enormous permitting workload even though most of the discharges would not have significant environmental impacts.

133 Cong. Rec. H168, H170 (January 8, 1987) (statement of Rep. Hammerschmidt).

tion compels EPA to use the NPDES permitting program as the regulatory tool. Indeed, while EPA chose to subject Phase II storm water sources to NPDES permitting, the Ninth Circuit in *EDC* expressly recognized that "EPA was free to adopt any regulatory program including a permitting program" in its Phase II regulations. *EDC*, 344 F.3d at 844.

In short, the holding in *EPIC* is inconsistent with the plain language of the statute, its legislative history, EPA regulations, and relevant case law. Moreover, *EPIC's* reading of 402(p) could force the agency to considerably expand the universe of storm water point sources that it must regulate, directly contravening Congress's purpose in enacting section 402(p). The EPIC court substituted its judgment for EPA's about when to regulate such dischargers and how to set priorities for such regulation. Therefore, this Court should follow the Ninth Circuit's holding in *EDC* and the Vermont District Court's decision in *CLF* (which was upheld by the Second Circuit) to reject *EPIC's* misreading of section 402(p).

V. CONCLUSION

EPA's silvicultural point source regulations at 40 C.F.R. § 122.27 define the discharges from forestry roads at issue in this case as nonpoint sources that do not require NPDES permits. Additionally, EPA has adopted storm water regulations at 40 C.F.R. § 122.26 providing that point source storm water discharges that are not expressly covered by these regulations are not required to obtain NPDES permits. Under EPA's interpretation of these regulations and section 402(p) itself, discharges from the forestry roads at issue in this case are not subject to an NPDES permit requirement. Therefore, these discharges comply with section 402. As such, these dis-

charges also comply with section 301(a), even in the absence of an NPDES permit.

For these reasons, and pursuant to all the arguments set forth above, this Court should grant defendants' motions to dismiss.

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[Signature block omitted in printing]

RECORD
AND
BRIEFS

Nos. 11-338 and 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

The Clean Water Act defines "point source" to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch [or] channel ... from which pollutants are or may be discharged." 33 U.SC. § 1362(14). The U.S. Environmental Protection Agency's stormwater regulation requires National Pollutant Discharge Elimination System permits for point-source stormwater discharges associated with the logging industry. 40 C.F.R. § 122.26(b)(14)(ii). And the agency's "silvicultural rule," 40 C.F.R. § 122.27(b)(1), does not, on its face, exclude any point sources of pollution associated with logging from the Clean Water Act's permit requirement. With these provisions in mind, respondent Northwest Environmental Defense Center brought a Clean Water Act citizen suit alleging that the petitioners were in violation of the Act by discharging polluted stormwater from pipes, ditches and channels along active logging roads without the required permits. The question presented is:

Did the court of appeals err by reversing the district court's Rule 12(b)(6) dismissal of respondent's complaint?

RULE 29.6 STATEMENT

Respondent Northwest Environmental Defense Center has no parent corporations and no publicly held company has any ownership interest in it.

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INTRODUCTION

In this Clean Water Act citizen suit, the court of appeals correctly held that a complaint filed by respondent Northwest Environmental Defense Center (NEDC) stated a claim for relief by alleging that the petitioners must comply with a stormwater regulation of the U.S. Environmental Protection Agency (EPA), 40 C.F.R. § 122.26, which requires National Pollutant Discharge Elimination System (NPDES) permits for point-source stormwater discharges associated with the logging industry. The court further held that another regulation, 40 C.F.R. § 122.27, does not exclude point-source discharges along active logging roads from EPA's stormwater regulation or otherwise redefine those discharges as nonpoint-source pollution that is exempt from the NPDES permit requirement.

The court of appeals' decision does not merit review because it does not conflict with decisions of any other court of appeals. No other decision has addressed whether 40 C.F.R. § 122.26 requires NPDES permits for point-source stormwater discharges along logging roads. Nor does the lower court's interpretation of the NPDES regulations, or the Clean Water Act (CWA or Act) provisions that they implement, conflict in principle with decisions of this Court or another court of appeals. The court's resolution of these narrow regulatory issues, in a non-final ruling that sustains a complaint under Rule 12(b)(6) and that does not determine what relief, if any, respondent may ultimately receive, does not merit review by this Court.

The petitioners' attempts to identify some aspect of the court of appeals' decision that requires further review are without merit.[1] Pursuing an argument that the United States (as amicus) initially advanced *but then conceded was incorrect*, the petitioners claim that the court effectively invalidated EPA rules during a civil enforcement proceeding in violation of section 509(b)(2) of the Act, 33 U.S.C. § 1369(b)(2). But NEDC did not challenge, and the court of appeals did not strike down, any rule. Nor did the court effectively invalidate a rule by construing it in a way that conflicts with its text. Rather, in rejecting the petitioners' claimed regulatory defenses, the court relied on "a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals's view of the statute." *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007). The court of appeals did not grant NEDC relief that is barred by section 509(b)(2).

Nor did the court err by declining to defer to the claim that the rules do not require permits for stormwater discharges from pipes, ditches and channels along logging roads. The petitioners do not dispute that the roads are used for hauling timber or that they discharge stormwater from pipes, ditches and channels. They nonetheless seek an interpretation of the rules that: ignores EPA's decision to include "logging" on the list of industries subject to the stormwater rule; treats pipes, ditches and channels—

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[1] The petitioners in No. 11-338 are referred to as "the State" and the petitioners in No. 11-347 are referred to as "Georgia-Pacific" (collectively, "the petitioners").

statutory "point sources"—as "nonpoint sources" that are excluded from the NPDES permit program; and deems stormwater discharged from elaborately engineered stormwater collection systems to be "natural runoff." The court of appeals correctly refused to accept that interpretation.

Nearly forty years ago, Congress created the NPDES permit program *precisely* because state water pollution control programs were not adequately protecting the Nation's waters. *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 202-205 (1976); 117 Cong. Rec. 38,798-99 (1971). The petitioners ignore this fundamental purpose of the NPDES permit program in asking this Court to grant review so that Oregon may continue treating stormwater discharges from pipes, ditches and channels as nonpoint-source pollution. Where, as here, active logging roads discharge pollution from pipes, ditches and channels, Congress prohibited those discharges unless they are in compliance with an NPDES permit. The court of appeals' decision implements Congressional intent; it does not thwart it.

STATEMENT OF THE CASE

I. This CWA citizen enforcement action.

To enhance enforcement of the CWA, section 505(a)(1) of the Act, 33 U.S.C. § 1365(a)(1), authorizes adversely affected citizens to bring suit against any person "who is alleged to be in violation" of an "effluent standard or limitation" or a related federal or state order. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 174 (2000). "The purpose of

the citizen suit provision of the CWA, 33 U.S.C. § 1365, is to permit citizens to enforce the Clean Water Act when the responsible agencies fail or refuse to do so." *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007).

Seeking to enforce EPA regulations, NEDC brought this citizen suit against the petitioners because they failed to apply for and obtain NPDES permits for stormwater discharges from pipes, ditches and channels along logging roads used to haul timber out of the Tillamook State Forest in northwest Oregon. ER 07 (NEDC's First Amended Complaint) at 2-4.[2] The State of Oregon owns the Tillamook State Forest and manages it as a working forest to produce revenue from the harvest and sale of timber. *Id.* at 3, 6-7, 18-20. All of the defendants participate in the logging operations that take place. *Id.* The members of the Oregon Board of Forestry set policy for the Oregon Department of Forestry, the agency that manages logging activities and logging roads in the Tillamook State Forest. *Id.* at 6-7. Mr. Decker, the Oregon State Forester, supervises the Department and administers its timber sale and state forests programs. *Id.* The four timber companies purchase timber from the state; harvest timber in the Tillamook State Forest; haul timber on logging roads that are specifically designated in timber sale contracts as timber hauling routes; and maintain those roads to facilitate the logging activities that take place. *Id.* at 7-8, 19-20.

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[2] ER refers to the Appellant's Excerpts of Record on file with the court of appeals. They are cited as "ER [document number] at [excerpts of record page number]."

The logging roads at issue collect, channel and discharge polluted stormwater to rivers and streams. *Id.* at 2, 17-18, 31-35. The roads were intentionally designed and built to move stormwater that falls on them into roadside ditches, which then convey stormwater through pipes, ditches and channels before discharging it directly into surface waters. *Id.* Water quality sampling confirmed that the stormwater is heavily polluted with sediment generated by heavy logging trucks that grind up gravel and other surface materials placed on the roads to facilitate industrial activity—logging and timber hauling. *Id.* at 3-4, 33, 35. NEDC alleged that these "discharges of stormwater associated with industrial activity" require NPDES permits. *Id.* at 3, 20-24, 31; *and see* 40 C.F.R. § 122.26(a)(1)(ii) and (e)(1)(i).

II. The NPDES permit program controls "discharges of pollutants."

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to eliminate discharges of pollutants to navigable waters by 1985. 33 U.S.C. § 1251(a). The Act's centerpieces are sections 301(a) and 402(a), which prohibit the "discharge of any pollutant" unless it is authorized by an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

The Act expansively defines "discharge of a pollutant" in part as "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C.

§ 1362(12)(A) (emphases added). The Act also broadly defines "point source" as

> any discernible, confined and discrete conveyance, including but not limited to *any pipe, ditch, channel*, tunnel, *conduit*, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, *from which pollutants are or may be discharged*. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (emphases added); *Miccosukee*, 541 U.S. at 105.

These statutory prohibitions apply to discharges associated with logging. Congress expressly exempted some stormwater discharges associated with mining and oil and gas exploration. 33 U.S.C. § 1342(l). Through statutory definitions, Congress also excluded certain "point sources," including "agricultural stormwater discharges," and certain "pollutants." 33 U.S.C. § 1362(6) & (14). But Congress did not adopt any NPDES permit exemption for the logging industry. *See Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (striking down an NPDES permit exemption for point-source stormwater discharges associated with silvicultural activities).

Sections 301(a) and 402(a) thus codify the central principle of the Act: pollutant discharges from "point sources" require NPDES permits, while pollution from something other than a point source—generally referred to as a nonpoint source—does not. Notably, a

single activity can generate both point and nonpoint source pollution. *Miccosukee*, 541 U.S. at 106; *U.S. v. Earth Sciences*, 599 F.2d 368, 372-73 (10th Cir. 1979).

III. EPA's Phase I stormwater regulation requires NPDES permits for stormwater discharges associated with the logging industry.

Since its adoption in 1972, the CWA has also prohibited point-source discharges of polluted stormwater that are not authorized by an NPDES permit. EPA regulations have long defined the term "discharge of a pollutant" to include "additions of pollutants into waters of the United States from: *surface runoff which is collected or channelled by man.*" 40 C.F.R. § 122.2 (emphasis added).

Dissatisfied with the pace of stormwater permitting, however, Congress enacted section 402(p) of the Act in 1987 to better control discharges of polluted stormwater. 33 U.S.C. § 1342(p). For stormwater discharges "associated with industrial activity," sections 402(p)(2)(B) & (4)(A) required EPA to issue stormwater regulations by 1989 and required EPA and the states to process NPDES permit applications by 1991. Section 402(p)(5)-(6) then required EPA to study other stormwater discharges and decide whether and how to regulate them. EPA implemented section 402(p) by issuing stormwater regulations in 1990 (Phase I), 55 Fed. Reg. 47990 (Nov. 16, 1990), and 1999 (Phase II), 64 Fed. Reg. 68722 (Dec. 8, 1999). Those regulations are codified at 40 C.F.R. § 122.26.

Like the definition of "discharge of a pollutant" in 40 C.F.R. § 122.2, EPA's Phase I regulation treats stormwater that is collected and channeled by man as a point-source discharge requiring an NPDES permit. The regulations define the term "storm water" (standing alone) to mean "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). But the rules require a permit for a "[s]torm water *discharge* associated with industrial activity," which means in part "*the discharge from any conveyance that is used for collecting and conveying storm water....*" 40 C.F.R. § 122.26(b)(14) (emphases added). This language clarifies that the Phase I regulation requires permits only for point-source discharges of industrial stormwater. *See also* 55 Fed. Reg. at 47996 ("this rulemaking only covers storm water discharges from point sources"). Uncollected stormwater is thus nonpoint-source runoff, while stormwater that is collected and conveyed before being added to waters of the United States is a point-source discharge that requires an NPDES permit.

In the Phase I rule, EPA identified the industrial activities required to obtain NPDES permits for their point-source stormwater discharges by naming industries and listing Standard Industrial Classification (SIC) codes. *See* 40 C.F.R. § 122.26(b)(14)(i) – (xi). Before listing the industries and SIC codes, the regulation states: "The following categories of facilities are considered to be engaging in 'industrial activity' for purposes of paragraph (b)(14)...." *See id.* § 122.26(b)(14) and 55 Fed. Reg. at 48011 ("EPA intends that the list of applicable SICs will define and

identify what industrial facilities are required to apply.")

The Phase I rule includes "Logging" on the list of regulated industries. In 40 C.F.R. § 122.26(b)(14)(ii), EPA required permits for facilities classified as SIC 24, which is entitled "Lumber and Wood Products, Except Furniture." ER 47 at 93. One of the subcategories of SIC 24 is SIC 2411, "Logging," which includes "[e]stablishments primarily engaged in cutting timber and in producing ... primary forest or wood raw materials ... in the field." *Id.*

The rule also requires NPDES permits for many other industrial activities that do not occur at traditional industrial plants. *See* 40 C.F.R. § 122.26(b)(14)(iii) (inactive mines), (v) (landfills and open dumps), (x) (construction). EPA clearly regulated discharges from "manufacturing, processing or raw materials storage areas at an industrial plant," *id.* § 122.26(b)(14), but EPA also stated that it was "supplementing" that language "with a description of various types of areas that are directly related to an industrial process." 55 Fed. Reg. at 48007.

In addition to listing the industries subject to the rule, the Phase I regulation explains which stormwater discharges are "associated with" the regulated industries:

> For the categories of industries identified in this section, the term [stormwater discharge associated with industrial activity] *includes, but is not limited to, storm water discharges from* industrial plant yards; *immediate access roads and*

> *rail lines used or traveled by carriers of raw materials*, manufactured products, waste material, or by-products used or created by the facility; [and] *material handling sites* ....

40 C.F.R. § 122.26(b)(14) (emphasis added). EPA's rules define "site" to include "the land or water area where any 'facility or activity' is physically located or conducted...," 40 C.F.R. § 122.2, and define "material handling activities" to include the "storage, loading and unloading, transportation, or conveyance of any raw material," 40 C.F.R. § 122.26(b)(14). "Material handling sites" thus refers to locations used for transporting or conveying any raw material.

IV. The silvicultural rule.

In addition to regulating the logging industry, the Phase I regulation incorporates by reference the general NPDES permit regulations. *Id.* ("The term [storm water discharge associated with industrial activity] does not include discharges from facilities or activities excluded from the NPDES program under this part 122."). The Part 122 regulations include 40 C.F.R. § 122.27, which was promulgated in 1980 and addresses silvicultural activities. 45 Fed. Reg. 33290, 33446-33447 (May 19, 1980). The subsection of the rule at issue in this case states:

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of

> the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 C.F.R. 209.120 and part 233).

40 C.F.R. § 122.27(b)(1) (the silvicultural rule).

As its text demonstrates, the silvicultural rule provides a definition of the term "silvicultural point source"; clarifies that *nonpoint*-source activities that generate "natural runoff" are excluded from that term; and notes that some activities that generate nonpoint-source pollution may also generate point-source pollution that requires a CWA permit.

When EPA promulgated the current version of the rule in 1980, one could not have known that it might be construed to exclude point-source discharges from the NPDES program. The text of the prior, 1979 version of the rule only addressed nonpoint source silvicultural activities in a comment and did not use the phrase "natural runoff." *See* 44 Fed. Reg. 32854, 32914-15 (June 7, 1979). The text of the 1980 rule, however, included new regulatory language stating that the term "silvicultural point source" did not include "nonpoint source silvicultural activities" from which there is "natural runoff." *See* 45 Fed. Reg. at

33446-33447. Moreover, the 1980 rule did not explain the meaning of "natural runoff" either in the rule itself or in its preamble.

V. The proceedings below.

After NEDC filed suit, the petitioners moved to dismiss the case under Rule 12(b)(6), contending that NEDC had failed to state a claim upon which relief could be granted. State Pet. App. 56. The petitioners argued that the Phase I rule incorporated the silvicultural rule by reference, and that the silvicultural rule redefined their pipes, ditches and channels as nonpoint sources that do not require NPDES permits. *Id.* at 65-67. According to the petitioners, the second sentence of the silvicultural rule—which addresses natural runoff from nonpoint source silvicultural activities—categorically defines all pollution from the listed activities as nonpoint-source pollution. *Id.* at 66. The United States, which did not exercise its right to intervene, *see* 33 U.S.C. § 1365(c)(2), submitted an amicus brief in support of the petitioners. The district court dismissed NEDC's complaint, finding that it had jurisdiction over the case but that the silvicultural rule redefined "the road/ditch/culvert system" as a nonpoint source of pollution. State Pet. App. 62, 70, 72, 76.

On appeal, the court of appeals focused on the merits because all the petitioners acknowledged that the court had jurisdiction. *See* State Appellee's Br. at 1; Industry Appellee's Br. at 1. The court of appeals concluded that stormwater that is collected by and discharged from a system of ditches, culverts, and channels along logging roads is a point-source dis-

charge requiring an NPDES permit. State Pet. App. 52. The court therefore reversed the judgment of the district court and remanded the case for further proceedings. *Id.*

Specifically, after determining that the silvicultural rule was ambiguous, the court declined to construe the rule as an NPDES permit exemption for discharges from pipes, ditches and channels because, as the court stated, "[i]f the Rule is read in this fashion, it is inconsistent with § 502(14) [33 U.S.C. § 1362(14), the statutory definition of "point source"] and is, to that extent, invalid." State Pet. App. 36-37. Instead, and consistent with the statute and the silvicultural rule's own language, the court construed the rule as exempting only "natural runoff" from nonpoint sources. *Id.* at 37. The court concluded that "the exemption ceases to exist as soon as the natural runoff is channeled and controlled in some systematic way through a 'discernible, confined and discrete conveyance' and discharged into the waters of the United States." *Id.*

The court then considered the 1987 amendments to the CWA and EPA's Phase I regulation. The court recognized that by incorporating the silvicultural rule into the Phase I rule EPA intended "to exempt from the definition of 'discharges associated with industrial activity' any activity that is *defined as a nonpoint source* in the Silvicultural Rule." *Id.* at 43 (emphasis added). However, for two reasons, the court refused to import into the Phase I rule a construction of the silvicultural rule that exempted *point-source* discharges.

First, because the Act requires NPDES permits for "stormwater discharges associated with industrial ac-

tivity," and because EPA clearly designated "logging" as an industrial activity, that construction would bring the regulation into conflict with the statute by exempting some "stormwater discharges associated with industrial activity" from the NPDES permit requirement. *Id.* at 44 (citing 33 U.S.C. § 1342(p)(2)(B) and (4)(A) and *Natural Res. Def. Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992)) and 47-48. Second, it followed from the court's construction of the silvicultural rule that the "reference to the Silvicultural Rule in 40 C.F.R. § 122.26(b)(14) *does not ... exempt [point-source] discharges from EPA's Phase I regulations....*" *Id.* at 47-48 (emphasis added). The court therefore held that neither the silvicultural rule nor the 1987 amendments to the CWA exempt from the NPDES permit requirement any stormwater that is collected and channeled in ditches, channels and conduits along logging roads before being discharged into rivers and streams. *Id.*

The petitioners sought rehearing and rehearing *en banc* on non-jurisdictional grounds. The court of appeals, at the request of a judge not on the original panel, directed the parties to submit supplemental briefs addressing the United States' contention, as amicus curiae, that NEDC's appeal was a challenge to the silvicultural rule that was barred by CWA section 509(b)(2), which prohibits review of certain EPA orders during enforcement actions. *Id.* at 8. In their reply in support of the petitions for rehearing, and for the first time since NEDC filed suit in 2006, the petitioners then argued that section 509(b) barred the court from hearing the case. The United States, however, submitted a second amicus brief conceding that

section 509(b) did not bar the court from construing the regulations as the panel had done. *Id.* at 8.

The panel voted unanimously to deny rehearing, and not a single judge requested a vote on whether to hear the case *en banc*. *Id.* at 4. Accordingly, the court issued a revised opinion that held that section 509(b)(2) did not bar NEDC from contesting the regulatory interpretations offered by the United States in its amicus brief and that reiterated the court's holding that EPA's rules require NPDES permits for stormwater discharges from pipes, ditches and channels along logging roads used for hauling timber.

REASONS FOR DENYING THE WRIT

I. The court of appeals' decision does not conflict with decisions of other circuits or of this Court.

A. No other court has addressed whether the Phase I regulation requires NPDES permits for point-source discharges along logging roads.

1. Georgia-Pacific incorrectly claims that the court of appeals' construction of the Phase I and silvicultural rules conflicts with decisions of other courts of appeals. GP at 25-28. Yet Georgia-Pacific has not identified *any* case holding that the Phase I regulation exempts industrial logging activities from the NPDES permit requirement. Nor can they: the decision below is the first appellate opinion to address whether 40 C.F.R. § 122.26(b)(14) requires NPDES permits for stormwater discharges from pipes and ditches along

active logging roads. No conflict could possibly result from its holding.

Nor have the courts issued conflicting interpretations of the silvicultural rule. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (holding that 40 C.F.R. § 122.27 is not an NPDES exemption for point-source pesticide discharges associated with forestlands); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates*, 278 F. Supp. 2d 654 (E.D.N.C. 2003) (holding that 40 C.F.R. § 122.27 is not an NPDES permit exemption for stormwater drainage ditches associated with forestlands); *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.*, 2003 WL 25506817 (N.D. Cal.) (holding that 40 C.F.R. § 122.27 does not exempt stormwater drainage ditches associated with forestlands from the NPDES permit requirement); *and see also Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999) (holding that discharges of collected and channeled stormwater associated with timber harvest were subject to NPDES permit requirements). There is no final decision that considers the silvicultural rule and holds that it exempts point-source discharges associated with timber hauling from the NPDES permit requirement.

2. Georgia-Pacific's reliance on *Newton County Wildlife Association v. Rogers*, 141 F.3d 803 (8th Cir. 1998), is misplaced because that case did not address the regulation of logging roads under the Phase I rule. *Newton County* considered whether the Forest Service's failure to obtain NPDES permits for logging and road construction activities rendered its approval of timber sales unlawful under the Administrative Procedure Act, 5 U.S.C. § 706(2). The court found no

violation because EPA regulations require *operators* to obtain the permits and because the plaintiff cited no authority requiring the Forest Service to obtain permits "before contracting to allow others to harvest timber and build roads." *Newton County*, 141 F.3d at 810 (citing 40 C.F.R. § 122.21(b)). The court then added a single sentence stating that EPA regulations do not require NPDES permits for "logging and road building activities." *Id.* (citing, *inter alia*, the silvicultural rule).

Newton County's passing mention of the silvicultural rule does not justify review of the court of appeals' unanimous holding in this case. First, the court's statement about NPDES permits for "logging and road building" was dicta unnecessary to its holding that the Forest Service did not violate the APA by approving a timber sale without obtaining an NPDES permit. Second, the Eighth Circuit's passing comment did not cite, much less consider, the Phase I regulation, nor did it analyze the terms or scope of the silvicultural rule. Indeed, *Newton County* did not in any way address the issue here, which is not whether "logging and road building activities" by themselves require NPDES permits, but whether *discharges from point sources*—that is, pipes, ditches and channels—along timber hauling routes require NPDES permits. As to whether the silvicultural rule excludes point sources, every court that has examined the rule has determined that it does not. There is no conflict between the unanimous court of appeals' decision and *Newton County*.

3. The court of appeals' decision also does not conflict with the district court's decision in *Conserva-*

tion Law Foundation v. Hannaford Bros. Co., 327 F. Supp. 2d 325 (D. Vt. 2004), which the Second Circuit affirmed in an unpublished order, 139 F. App'x 3381 (2005). In *Conservation Law Foundation*, 327 F. Supp. 2d at 330-32, the district court held that stormwater discharges only require NPDES permits if they are from activities listed in EPA's stormwater rules. Georgia-Pacific now claims that the decision below conflicts with *Conservation Law Foundation* by requiring NPDES permits for stormwater discharges not listed in EPA's stormwater rules. GP at 26-27.

The fatal flaw in Georgia-Pacific's argument is that the court of appeals *did not rule* that NPDES permits are required for stormwater discharges that are not listed in EPA's rules. Rather, it held that by listing logging in the Phase I rule EPA required permits for stormwater discharges associated with that industry. State Pet. App. 42-48. Even if a conflict with a single district court opinion would merit review (*but see* S. Ct. R. 10), there is no conflict: the two cases have different outcomes because logging is listed in the stormwater rule and the parking lot at issue in *Conservation Law Foundation* was not. But the decisions are otherwise consistent.

4. The court of appeals' decision also does not conflict with the other cases cited by Georgia-Pacific. GP at 28. It does not conflict with the Ninth Circuit's own decision in *Environmental Defense Center v. EPA*, 344 F.3d 832, 860-63 (9th Cir. 2003), because that decision did not address the Phase I rule or hold that logging roads are subject to the Phase II rule. Rather, in *Environmental Defense Center* the court remanded the question *whether* logging roads should be covered

by the Phase II rule because EPA had not adequately addressed that issue in responding to comments. There is no intra-circuit conflict with *Environmental Defense Center*, as the court of appeals explained. State Pet. App. 48.

Nor does the court of appeals' decision conflict with *Fishermen Against the Destruction of the Environment v. Closter Farms*, 300 F.3d 1294 (11th Cir. 2002) (holding that a sugar-cane farm was entitled to a statutory exemption for agricultural stormwater discharges) or *Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources*, 299 F.3d 1007 (9th Cir. 2002) (deferring to EPA's determination that mussel-harvesting rafts are not point sources). Neither decision creates an inter- or intra-circuit conflict because neither addresses logging, logging roads, the silvicultural rule, or the Phase I stormwater regulation.

B. There is no conflict with cases decided under section 509(b) of the Act because NEDC did not challenge, and the court of appeals did not invalidate, any action of the EPA administrator.

The petitioners contend that the court of appeals held, in conflict with decisions from other circuits, that it had jurisdiction in a citizen suit to invalidate an EPA rule. The petitioners rely on decisions holding that section 509(b) of the Act, 33 U.S.C. § 1369(b), provides the sole opportunity for judicial review of certain "Actions of the Administrator," including, the petitioners contend, judicial review of NPDES permit regulations. State at 19-24; GP at 29-30. Although pe-

titioners contend that this issue is jurisdictional, their argument is not really that the district court lacked jurisdiction over respondent's citizen suit, but rather that section 509(b) limits the construction that a court may place upon an EPA regulation in a suit over which it *has* jurisdiction. The petitioners waived their section 509(b) arguments by failing to raise them until their joint reply brief in support of the petitions for rehearing. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). Moreover, as EPA essentially conceded when it abandoned its section 509(b) argument below, the petitioners' arguments are without merit.

The CWA limits citizen suits in two important ways. First, district courts only have jurisdiction if the plaintiff provides notice of the alleged violations to EPA, the state in which the alleged violations are occurring, and the alleged violators, and if neither EPA nor the state files an enforcement action before the citizen files suit. 33 U.S.C. § 1365(b); *Laidlaw,* 528 U.S. at 174-75. Second, the CWA limits the *relief* available to citizen plaintiffs: section 509(b)(2) prohibits courts in civil enforcement actions from providing judicial review of any "Actions of the Administrator" that could have been reviewed under section 509(b)(1), which authorizes direct review in the courts of appeals of certain EPA actions. 33 U.S.C. § 1369(b).

1. The decision below does not conflict with decisions applying section 509(b). The bar on judicial review in section 509(b)(2) is inapplicable to this case because NEDC did not challenge any "Action of the Administrator." ER 07 at 2, 24-25. After complying with the Act's jurisdictional requirements, *see id.* at 2-5, 26-71, NEDC filed suit contending that EPA's regu-

lations *as written* require the petitioners to obtain NPDES permits. NEDC has *never* alleged in this litigation that the Phase I regulation or the silvicultural rule violates the CWA or is otherwise invalid. *See* ER 07 at 24-25 (prayer for relief). NEDC simply sought enforcement of the Phase I regulation.

2. Consistent with NEDC's complaint, the court of appeals did not invalidate any rule. Rather, the court *interpreted* the rules when it held that they require NPDES permits for stormwater discharges from pipes, ditches and channels along logging roads used for hauling timber. Based on those holdings the court reversed the judgment of the district court and remanded the case for further proceedings, but it did not vacate any rule. State Pet. App. 52.

3. The court of appeals was well within its authority to interpret the NPDES permit regulations as it did. In applying what the State calls the "near-identical" provision of the Clean Air Act, 42 U.S.C. § 7607(b), (State at 20), this Court recently recognized that federal courts can construe Clean Air Act regulations during civil enforcement proceedings, provided they do not determine that a regulation as written is invalid. *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007). In *Duke Energy*, this Court vacated a judgment because the lower court "effectively invalidated" a regulation by giving it a reading "inconsistent with its terms" (*id.* at 566) in derogation of section 7607(b), which, like section 509(b), "limit[s] challenges to the validity of a regulation during enforcement proceedings" when such review could have been obtained in a court of appeals. *Id.* at 581 (citing 42 U.S.C. § 7607(b)). Because this Court viewed a

construction of the regulation that contradicted its text as "an implicit invalidation" of that rule, this Court remanded the matter so the lower courts could consider the "applicability or effect" of section 7607(b). *Id.* On remand, the district court determined it could interpret and apply the regulations at issue in resolving EPA's civil enforcement action. *U.S. v. Duke Energy Corp.*, 2010 WL 3023517, *6 (M.D.N.C.).

Duke Energy is pertinent here for two reasons. First, this Court recognized a distinction between interpreting a regulation to "bring it into harmony" with a statute, which is permissible, and determining that the regulation as written is invalid, which runs afoul of the prohibition on judicial review in enforcement proceedings. As this Court put it, the preclusion of review does not bar "a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals's view of the statute...." *Duke Energy*, 549 U.S. at 573. Second, this Court looked to the plain language of the rule to determine whether the court of appeals' interpretation "effectively invalidated" the regulation. *Id.* at 577-578. This Court held "that the Court of Appeals's reading of the 1980 PSD regulations, intended to align them with the NSPS, *was inconsistent with their terms and effectively invalidated them*; any such result must be shown to comport with the Act's restrictions on judicial review of EPA regulations for validity." *Id.* at 566 (emphasis added).

In this case, the court of appeals permissibly construed the silvicultural rule to ensure harmony with the statute. Finding the rule to be ambiguous, the court rejected the petitioners' interpretation because

it would redefine pipes, ditches and channels as nonpoint sources, thereby creating an impermissible conflict with the statutory definition of point source. State Pet. App. 34-37. Instead, and consistent with both the statute and the regulatory text, the court construed the rule as excluding *only* stormwater that is not channeled and controlled through point sources. *Id.* at 37. The court's determination that stormwater discharged through point sources is not "nonpoint source" "natural runoff" is entirely consistent with the rule's text; it does not "implicitly invalidate" it in any way.

Nor is there any credible argument that the court invalidated the Phase I regulation. The court relied on the rule's plain language in holding that EPA included SIC 2411 in the list of regulated "industrial activities." *Id.* at 44-47. The court further relied on its holding that the silvicultural rule does not exclude point-source discharges from the NPDES permit requirement. *Id.* at 47-48. And the court bolstered its reading of the Phase I regulation by noting that reading the rule to exempt point-source discharges associated with logging would be contrary to sections 502(14) and 402(p) of the Act. *Id.* But the court did not give the Phase I rule a meaning that conflicts with its text; consequently, it did not "effectively invalidate" that rule or grant NEDC any relief barred by section 509(b)(2).

4. To demonstrate error under *Duke Energy*, the petitioners must establish that the court of appeals' interpretations are impermissible because they are *inconsistent with the text of the rules*. 549 U.S. at 566. Yet the petitioners make little attempt to explain how

the court's interpretations conflict with the regulatory text. Instead, they fail to alert this Court to obviously pertinent authority—*Duke Energy*—and they rely on bare assertions that lack specificity and analysis. Those failures alone render the petitioners' arguments unpersuasive.

Any argument that the court of appeals' reading of the rules is impermissible—that it is inconsistent with the regulatory text—ultimately must rest on a demonstration that the silvicultural rule *expressly exempts* certain activities from the NPDES permit requirement even when they convey pollution through statutory point sources. The petitioners rely on the second sentence of the silvicultural rule, but that sentence does not categorically define the listed activities as "nonpoint sources" nor does it *redefine* any point-source discharge as a nonpoint source of pollution, as claimed. GP at 18; State at 31-32. "Simply put, the regulation excludes nonpoint source silvicultural activities from NPDES permit requirements...." *Forsgren*, 309 F.3d at 1186. Indeed, the plain language of the rule does not allow for a construction that excludes statutory point sources from regulation. But even if there is some ambiguity in the language, as the court of appeals concluded, the court's construction is at least a *permissible* one.

Two elements of the text confirm this. First, the phrase "the term" at the beginning of the second sentence indicates that the subsequent text elaborates on the definition of "silvicultural point source" by explaining that it does not include "non-point source silvicultural activities ... from which there is natural runoff." The second sentence is thus not an additional

definition of a new term but rather a continuation of the definition of "silvicultural point source." Together, the first two sentences reflect the Act's point/nonpoint dichotomy and explain the axiom that "silvicultural point source" does not include "nonpoint source silvicultural activities."

Indeed, and second, the text demonstrates that the second sentence *only* excludes nonpoint source "natural runoff." The phrases "such as" and "from which there is natural runoff" demonstrate that the second sentence is providing a list of silvicultural activities that are considered to be nonpoint sources of pollution *when and where* they produce "natural runoff." In other words, the phrase "from which there is natural runoff" conditions the nonpoint status of a pollution source on its production of "natural runoff." The rule also gives meaning to the term "natural runoff": the phrase "nonpoint source silvicultural activities...from which there is natural runoff" *equates* the terms "nonpoint source" and "natural runoff." In doing so, the rule indicates that "natural runoff" refers to stormwater that is *not* discharged from point sources like pipes, ditches and channels.

The silvicultural rule does not categorically define the listed activities as nonpoint sources nor redefine any point-source discharge as a nonpoint source of pollution. Consequently, there is no credible argument that the court of appeals' interpretations conflict with the regulatory text or that the court granted NEDC relief that is barred by section 509(b)(2). The court of appeals did not "effectively invalidate" the

rules by giving the terms "nonpoint source" and "natural runoff" their natural and accepted meaning.[3]

C. The court of appeals' methodology for interpreting administrative rules is consistent with this Court's precedents.

The petitioners contend that the court of appeals' approach to interpreting the Phase I regulation conflicts with this Court's methodology for interpreting administrative rules. State at 28-30; GP at 16-17, 24. According to the petitioners, the court should have deferred to EPA's claim that the Phase I regulation excludes point-source discharges along logging roads by generally incorporating the NPDES program rules. State at 29; GP at 20-21. Here again, the petitioners' arguments are without merit.

1. The court of appeals explicitly recognized and applied the well-accepted principle that courts must defer to an agency's construction of its regulation unless it is plainly erroneous, contrary to its text, or inconsistent with the statute. State Pet. App. 10-11 (citing *Auer v. Robbins*, 519 U.S. 452, 457, 461-62 (1997) and *Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 842-43 (1984)); *see also Duke Energy*, 549 U.S. at 573. The petitioners' complaint is therefore that the court misapplied a properly stated rule

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[3] Should this Court grant the petitions, NEDC would also argue that the position EPA stated in its rehearing amicus brief is correct and, additionally, that the rules at issue are not subject to section 509(b)(1) or (2) *at all* because they are not the result of any of the reviewable "actions" listed in section 509(b)(1).

of law to a highly particular set of circumstances. But even that is incorrect.

2. The State fundamentally misunderstands the Phase I rule when it claims that it excludes "from the definition of 'industrial activity' those activities defined to be nonpoint-source silvicultural activities in the silvicultural rule." State at 29. The Phase I regulation does not exclude any silvicultural activities *from the definition of "industrial activity"*; rather, the rule applies to the logging industry but does not require NPDES permits for *nonpoint sources* of pollution. The State's argument has two critical flaws.

First, to the extent the State is arguing that the Phase I rule incorporates an interpretation of the silvicultural rule that defines *all* pollution from the listed activities as nonpoint-source, that construction of the rule is not entitled to deference because it is inconsistent with the regulation's text. The petitioners completely fail to parse the silvicultural rule or explain how *its text* redefines the discharges at issue in this case as nonpoint-source pollution. Parsing the rule, however, demonstrates that it does not categorically "define" any activity as exclusively nonpoint in nature. As explained in section I.B.4., *supra*, the silvicultural rule excludes only nonpoint source natural runoff associated with certain logging activities; it does not exempt any point-source discharge from regulation.

Second, to the extent the State is arguing that the Phase I rule categorically excludes some silvicultural activities from the set of "industrial activities" covered by the rule, that interpretation is not entitled to

deference because it is inconsistent with the Phase I regulation. The rule contradicts that claim by stating explicitly that logging *is* an "industrial activity." The regulation states: "The following categories of facilities *are considered to be engaging in 'industrial activity' for purposes of paragraph (b)(14)....*" 40 C.F.R. § 122.26(b)(14) (emphasis added). The rule then undisputedly includes logging on the list of regulated industries. *See id.* § 122.26(b)(14)(ii) (listing facilities classified as SIC 24, which includes SIC 2411, "Logging").

Further, the rule does not place any limits on the logging activities that require permits for point-source stormwater discharges. Where EPA intended to exclude a category of facilities, it clearly stated that exclusion in the list of regulated industries. *See, e.g., id.* § 122.26(b)(14)(ii) ("Facilities classified as Standard Industrial Classification 24 (*except* 2434), 26 (*except* 265 and 267), 28 (*except* 283)...") (emphases added). EPA excluded SIC 2434 from SIC 24, but did not exclude SIC 2411. *Id.* Moreover, the Phase I regulation does not even *mention* the silvicultural rule in connection with the list of regulated industries. *Id.*

The rest of the regulatory text confirms that the rule applies to logging roads that support timber hauling. 40 C.F.R. § 122.26(b)(14). The rule requires permits for "immediate access roads traveled by carriers of raw materials" and for "material handling sites" "used for the transportation or conveyance of any raw material." *Id.* Additionally, the rule's narrative text is illustrative, not exhaustive, so stormwater discharges that are clearly "associated with" logging require NPDES permits even if they are not specifically listed.

See id. ("For the categories of industries identified in this section, the term includes, but is not limited to...."). Under any of these criteria, forest roads used for timber hauling are clearly "associated with" the logging industry. *See also* ER 47 at 94-100 (Klahnberry Timber Sale Contract).

3. Because there is no textual support for their interpretations, the petitioners look elsewhere for support. The petitioners' invitation to pore over regulatory preambles and litigation briefs to discern an intent not shown in the text of the rules does not, however, demonstrate that the court of appeals' decision conflicts with established principles of regulatory review; it is merely an argument that the lower court erred in applying those principles to the particular regulatory framework before the court. But even as a claim of error, the petitioners' arguments are unconvincing.

The State incorrectly claims that the preamble to the Phase I rule "reiterates" that EPA did not intend to require permits for stormwater discharged from logging roads. State at 29. But the preamble says *nothing* about excluding logging roads from the Phase I rule. To the contrary, it demonstrates that EPA fully intended that the list of applicable SIC codes would determine what activities require permits.

In response to public comments requesting that EPA exclude SIC 2411 from the Phase I rule, EPA refused to do so. Instead, EPA noted that the silvicultural rule "excludes certain sources." *See* 55 Fed. Reg. at 48011. But the preamble does not say *anything* about *which sources* are excluded, let alone suggest that the rule excludes any point-source discharges.

Instead, at the end of the discussion about SIC 2411, the preamble states: "*EPA intends that the list of applicable SICs will define and identify what industrial facilities are required to apply.*" *Id.* (emphasis added).

Taking a different approach, Georgia-Pacific seeks support for its argument in miscellaneous Federal Register notices and agency practice. Yet the Ninth Circuit has *twice* canvassed "the yellowed pages of the Federal Register," *Forsgren*, 309 F.3d at 1188, and *twice* ruled that the silvicultural rule is not an exemption for point-source discharges. *Id.* at 1186-88; State Pet. App. 20-32. The materials cited by Georgia-Pacific cannot justify construing the silvicultural rule in conflict with its text.

Nor can those materials justify construing the silvicultural rule in a manner that conflicts with the statute, which unambiguously defines pipes, ditches and channels as point sources. If, as NEDC has contended throughout this litigation, the silvicultural rule unambiguously excludes only nonpoint sources from the NPDES permit requirement, then the text's plain meaning controls and those materials are irrelevant. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (*Auer* is deference only at issue where a regulation is ambiguous); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct.. 2458, 2469 (2009). Alternatively, if the silvicultural rule is ambiguous, as the court of appeals found, then those materials and agency practice may be relevant to discerning the agency's intent. *Coeur Alaska*, 129 S. Ct.. at 2469, 2472-77. But their relevance for that purpose cannot justify, much less *require*, construing the rule in conflict with the statutory definition of point

source. Indeed, if the silvicultural rule is ambiguous then the court of appeals was fully empowered to construe the rule in harmony with the CWA. *Duke Energy*, 549 U.S. at 573. Either way, federal register notices and agency practice cannot justify deferring to an interpretation of the silvicultural rule that directly conflicts with Congress' unambiguous determination that "any pipe, ditch [or] channel" is a point source. 33 U.S.C. § 1362(14).

D. The court of appeals' decision does not conflict with this Court's precedents affording deference to agency statutory interpretations.

The petitioners incorrectly contend that the court of appeals' decision conflicts with this Court's established methodology for reviewing an agency's interpretation of a statute that it administers. State at 30-33; GP at 17, 20-24. The court of appeals explicitly recognized that a court reviewing an agency's construction of a statute must first determine whether Congress has directly spoken to the precise question at issue. State Pet. App. 10-11, 16; *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If the statute is silent or ambiguous, however, the court must defer to a reasonable construction of the statute embodied in an agency's lawful exercise of delegated authority. *Id.* at 843.

1. Here, the court of appeals' decision is entirely consistent with *Chevron*. The court was not obligated

to defer to an interpretation of the silvicultural rule that conflicts with the unambiguous statutory definition of point source. *Id.* at 842-43; *Duke Energy*, 549 U.S. at 573. Nor did the court have to defer to an interpretation of the Phase I rule that conflicts with the plain statutory obligation to require NPDES permits for point-source stormwater discharges associated with industrial activity. *Id.*

2. The State claims there is a conflict with *Chevron* because the court of appeals did not defer to what the State claims is EPA's construction of the statutory term "a storm water discharge associated with industrial activity." State at 29 (citing U.S. Amicus Br. at 28-31) and at 30-33. But the cited pages of EPA's amicus brief were not entitled to *Chevron* deference because in those pages EPA did not present a *statutory* argument that EPA claimed was entitled to *Chevron* deference. EPA did not assert that it identified a statutory ambiguity or gap in section 402(p)(2)(B) that it then construed and clarified by excluding logging roads from the Phase I rule. The court of appeals was not obligated to defer to a construction of the CWA that EPA did not present.

Nor did the court of appeals err by declining to defer to the statutory argument that EPA *did* present. EPA asserted in its amicus brief that the statutory definition of *point source* is ambiguous and that EPA's interpretation of the silvicultural rule was a reasonable construction of the Act. U.S. Amicus Br. at 13-20. The court of appeals explicitly relied on *Chevron* in rejecting that argument because Congress unambiguously defined pipes, ditches and channels as point sources. State Pet. App. 10-16; 33 U.S.C. § 1362(14).

Similarly, the court correctly declined to accept the contention that EPA could exclude logging roads from the Phase I rule even though EPA had determined that logging is an "industrial activity" subject to sections 402(p)(2)(B) and (4)(A) of the Act. *See* pp. 13-14, *supra*, and State Pet. App. 44-45, 47-48.

3. Making an altogether different argument, Georgia-Pacific now claims for the first time that the Act's definition of "point source" excludes "agricultural stormwater discharges" from the NPDES permit requirement and that silviculture is a form of agriculture. GP at 17, 20-24. Georgia-Pacific waived its new argument by failing to raise it below. *TRW, Inc. v. Andrews*, 534 U.S. 19, 33-34 (2001). But the argument also fails for two other reasons.

First, the CWA itself demonstrates that Congress did not intend the agricultural exemption to include logging activities: the plain language of the statute distinguishes agriculture from silviculture by referring to the two separately when it means a statutory provision to apply to both. *See* 33 U.S.C. §§ 1288(b)(2)(F); 1281(d)(1); 1314(f)(A); 1344(f)(1)(A). Because the statutory definition of point source only references "agricultural" stormwater, it does not also include stormwater discharges associated with silvicultural activities.

Second, EPA does not consider stormwater discharges associated with logging to be "agricultural stormwater discharges." That is clear enough from the Phase I regulation, which excludes agricultural stormwater from regulation but requires NPDES permits for the logging industry. *See* 40 C.F.R.

§ 122.26(a)(1)(v) *and* (b)(14)(ii). Georgia-Pacific has cited *no* evidence that EPA construes the agricultural stormwater exemption to include logging. Here again, the court of appeals was not obligated to defer to an interpretation of the statute that EPA never adopted.

II. The court of appeals' decision does not present a question of great practical importance.

Finally, the State contends that the court of appeals' decision warrants review because it "displaces" Oregon's regulatory scheme and requires Oregon to develop an NPDES permit for logging roads. State at 24-28. Georgia-Pacific complains that the decision unsettles the state-federal balance; that NPDES permits and associated legal requirements will overly burden logging road owners and operators; and that the court of appeals' ruling is bad environmental policy. GP at 30-35. According to the petitioners, owners and operators of logging roads must be allowed to continue collecting, channeling and dumping heavily polluted stormwater into waters of the United States without NPDES permits.

As an initial matter, NPDES permits will supplement, not eliminate, Oregon's existing regulatory programs. Oregon regulates forest practices through its Forest Practices Act; regulates nonpoint source pollution through its state water quality programs; and regulates point-source pollution through its authorized NPDES program. *See generally* Oregon Revised Statutes Ch. 468B and 527; Oregon Admin. Rules Ch. 340-041, -042, and -045. Although those programs have been in place for decades, Oregon still

does not adequately protect waters in its coastal areas from nonpoint-source pollution generated by logging activities.[4] In any event, to the extent Oregon currently regulates logging road pollution at all, NPDES permits will supplement those programs, not displace them.

More importantly, for point-source discharges of pollutants and stormwater, Congress fully intended to supplement ineffective state programs with the NPDES permit program. *See State Water Res. Control Bd.*, 426 U.S. at 202-205. Far from unsettling "the balance of environmental responsibilities between the State and federal government" (GP at 33), the court of appeals' decision implements longstanding Congressional intent to regulate point-source discharges of pollution to our Nation's waters, while leaving nonpoint-source pollution control to the states. 33 U.S.C. §§ 1311(a), 1329.

For this reason, any complaints about hypothetical regulatory burdens should be directed to the district court on remand or to the Oregon Department of Environmental Quality, the agency that will develop an NPDES permit for logging roads in Oregon. Georgia-Pacific claims that the court's decision "severely impacts" owners of logging roads and that "[t]he burden of NPDES permitting is substantial." GP at 30-31. Yet Georgia-Pacific cannot know anything about regulatory burdens until it obtains and complies with

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[4] *See* 16 U.S.C. § 1455b; the complaint and agreed dismissal order in *Northwest Environmental Advocates v. Gutierrez*, U.S. District Court for the District of Oregon, No. 09-cv-00017; *and* http://coastalmanagement.noaa.gov/nonpoint/pro_approve.html.

NPDES permits, which it has yet to do. Speculation about the effects of the decision is particularly premature because the court of appeals has only determined that NEDC's complaint states a cause of action. On remand, the district court has bifurcated liability and remedy proceedings and has not yet even determined liability. The petitioners' concerns can, and likely will, be addressed through the district court proceedings or through the upcoming public and transparent NPDES permit development process.

Congress long ago determined it would be good environmental policy to require NPDES permits for the logging industry when it opted not to exempt that industry from the NPDES permit program. Since then, the U.S. Court of Appeals for the District of Columbia has rejected EPA's NPDES permit exemption for point-source stormwater discharges associated with silvicultural activities (1977); EPA has required permits for stormwater discharges associated with the logging industry (1990); and the Ninth Circuit has held that EPA's silvicultural rule does not exempt statutory point sources from the NPDES permit program (2002). *Costle*, 568 F.2d at 1379; 40 C.F.R. § 122.26(b)(14)(ii); *Forsgren*, 309 F.3d at 1185-86. Notwithstanding those developments, Congress has refused to adopt a statutory exemption for the logging industry. Far from acquiescing in the petitioners' claimed exemption (GP at 23-24), Congress has steadfastly maintained its determination that discharges of pollutants associated with logging are prohibited unless authorized by an NPDES permit.

Under the court of appeals' decision, the petitioners will have to comply with the CWA like nearly eve-

ry other American industry. *See* 40 C.F.R. 122.26(b)(14)(i)-(xi). And just like those industries, the logging industry will adjust to NPDES permitting requirements, whatever they may turn out to be. This case is important to the parties, and it is important to water quality in Oregon's Coast Range, but it does not present an issue of great practical importance that warrants Supreme Court review.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

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RECORD AND BRIEFS

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In the Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP, & E. HARTNETT, SUPREME COURT PRACTICE (9th ed. 2007) 8, 9

The Ninth Circuit jettisoned 35 years of consistent EPA interpretation and practice when it held, reversing the district court, that NPDES permits are required for channeled precipitation runoff from forest roads. Our petition demonstrated that, under *Chevron* and *Auer*, the court of appeals should have deferred to EPA's interpretation of the Clean Water Act and of its own regulations, and to EPA's conclusion that channeled silvicultural runoff is "better controlled through the utilization of best management practices" (41 Fed. Reg. at 24710) and "ill-suited for inclusion in a permit program" requiring end-of-pipe effluent limitations designed for industrial polluters. *Train*, 396 F. Supp. at 1395. We showed too that it was improper for the Ninth Circuit to substitute its own view of what "associated with industrial activity" means for the considered views of the expert agency charged by Congress with implementing the Act. And we explained that these factors—coupled with disarray among the courts of appeals and the Ninth Circuit's erroneous imposition of a hugely burdensome permitting regime that will destroy jobs, bury regulators and industry in costly permit applications and litigation, and affirmatively harm the environment—easily satisfy Rule 10's criteria for certiorari.

1. In response, NEDC blithely asserts (at 1, 34-35) that this case involves "narrow regulatory issues" giving rise to "hypothetical regulatory burdens" of no "great practical importance." But the regulators and regulated have documented the facts—in amicus filings not mentioned, let alone answered, by respondent—and those facts confirm the need for this Court's immediate intervention.

In addition to Oregon, which has separately petitioned in No. 11-338, no fewer than 26 additional States have explained that the Ninth Circuit's erroneous ruling "raises an issue of exceptional importance warranting review because of the impact it will have on existing State [best management practice] programs." Br. of Arkansas, *et al.*, at 12. Subject to "EPA oversight and approval," these States regulate "forestry practices" with "the most comprehensive program of BMPs of any land use activity in the nation"—developed at the cost of "thousands of hours and millions of dollars" and carefully "adapted to local conditions and circumstances." *Id.* at 12, 14-15. Under the court of appeals' incorrect decision, these "BMP programs will be jettisoned," and a "blizzard" of permit applications will cause "tumult at the state level," "far outstripping" the resources available to state regulators. *Id.* at 15-16. And these 26 States have explained that with courts elsewhere following EPA's interpretation, they now face "a patchwork of uneven regulation," as well as the prospect of litigation as "environmental groups" seek "to extend the reach of the Ninth Circuit's decision." *Id.* at 20-21.

Explaining that many forest roads are owned by counties and other local government entities, the National Association of Counties shows in its amicus brief how the "drastic shift in the manner in which the CWA is implemented," mandated by the Ninth Circuit, will "inundat[e]" local governments with an "enormous workload" to obtain permits for ditches with "insignificant environmental impacts." Br. of Nat'l Ass'n of Counties, *et al.*, at 13. In Oregon alone, 4,800 miles of county roads serving forests include 20,000 cross culverts. *Id.* at 14. By analyzing current permit requirements for discharges associated with

industrial activity, the Association demonstrates the "staggering financial burden"—$56 million to Oregon counties alone, even before monitoring costs—of substituting NPDES permitting for best management practices. *Id.* at 15-18. And it shows how a "checkerboard" of county, state, BLM, U.S. Forest Service, and private rights over the vast "interconnecting system" of forest roads—"simply miscomprehended" by the Ninth Circuit—make the court of appeals' "entirely new interpretation of the CWA" utterly impractical in its "complexity." *Id.* at 19-20.

The American Forest Resource Council, Public Lands Council, National Cattlemen's Beef Association, and others dependent upon hundreds of thousands of miles of *federally* managed forest roads —including ranchers who use those roads to haul livestock—also urge this Court to grant certiorari. Their brief documents both the massive burden of permitting U.S. Forest Service roads (400,000 permits by the Forest Service's own estimate), and the certainty that the Ninth Circuit's faulty ruling will lead to costly litigation (as shown by the 60-day notice of suit that has already been filed against the Forest Service in Idaho, and a plethora of administrative protests based on the lack of NPDES permits). Br. of the Am. Forest Res. Council, *et al.*, at 9-12 & App. 1a, 10a.

Forestry associations from every corner of the Nation document the vast magnitude of the additional permitting burden imposed on forest road users and regulators by the Ninth Circuit—a burden that falls on top of the 411,500 NPDES permits that EPA's Office of Water and state permitting authorities already process, for which there is a $1 billion-plus funding shortfall. Br. of Alabama Forestry

Ass'n, *et al.*, at 13-22 & App. A8-A9; Br. of Nat'l Alliance of Forest Owners, *et al.*, at 2-3.

EPA thought this case important enough to file amicus briefs in both courts below, arguing strongly against the position adopted by the court of appeals and stating that subjecting forestry roads to NPDES permitting "would have significant implications" for the agency. See Pet. 22. Respondent's bare assertion that the Ninth Circuit's radical expansion of the NPDES program—and rejection of EPA's long-held interpretation—is not important enough to review defies common sense.

2. NEDC devotes most of its brief to asserting that the Ninth Circuit correctly interpreted the statutory and regulatory scheme. Its argument rests on the proposition that EPA's Phase I stormwater regulation, adopted in response to 1987 amendments to the CWA, "requires permits for point-source stormwater discharges associated with the logging industry," and that forest road runoff fits that definition. See Opp. i, 9, citing 40 C.F.R. § 122.26(b)(14)(ii) (which refers to SIC 24); 33 U.S.C. § 1342(p)(2)(B). That argument is incorrect.

What the Phase I regulation actually provides is that a permit is required for a point source discharge "that is *directly related* to manufacturing, processing or raw materials storage areas *at an industrial plant*," including "*immediate access roads*," and does not include "discharges *from facilities or activities excluded from the NPDES program under this part 122*" (emphasis added). As the United States explained below, this language does not apply to forest road runoff—whether or not it runs "through ditches [and] culverts"—for multiple reasons. Pet. App. 114a; Pet. 20-21.

First, the United States explained, EPA's Phase I regulation specifies that no permit is required for activities that are defined as nonpoint source by the Silvicultural Rule, 40 C.F.R. § 122.27. EPA has always interpreted "natural runoff" and similar terms in the Silvicultural Rule that designate nonpoint sources to include all forest road "'runoff from precipitation events,'" channeled or not. Pet. App. 113a-114a, 125a-126a.

Second, EPA has stated, "forestry roads" are "not 'directly related' to activities associated with an 'industrial plant' under any plain language meaning of the regulation," which applies to "sawmills, planing mills, and other mills" engaged in industrial production. Pet. App. 124a.

Third, contrary to NEDC's contention that SIC Code 24 encompasses forestry roads, the United States explained that forestry roads "inherently" have a broad range of uses including recreation, fire prevention, reforestation, maintenance of timber tracts, and forestry services, and "best fit within SIC Code 8," which is not covered by the Phase I regulations. Pet. App. 123a-125a. EPA was certainly entitled to reach that conclusion and to report to Congress that NPDES requirements do not apply to "runoff from agricultural and silvicultural activities (mostly within SIC codes 01-09)." Pet. App. 126a, quoting EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program* (Mar. 1995). The Ninth Circuit should have deferred to EPA's interpretation of the Phase I amendments and regulations. See Pet. 16-17, 22-24.

3. NEDC's claim that the Ninth Circuit's ruling is consistent with the text of the Silvicultural Rule fares no better. The rule defines the term "silvi-

cultural point source": it "*means*" "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities" and *does not include* "surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b). Were respondent correct that the rule only "clarifies that *nonpoint*-source activities that generate natural runoff are excluded" (Opp. 11) the rule would be entirely unnecessary ("nonpoint sources are nonpoint sources").

Furthermore, that is not how EPA has ever read the rule. The "intent of EPA in adopting the Rule," the Ninth Circuit acknowledged, was to exclude runoff from the "listed activities from the definition of point source, irrespective of whether" it "is collected, channeled, and discharged." Pet. App. 32a. There is ample statutory authority for the rule as thus interpreted. See 33 U.S.C. § 1362(14) (the "term 'point source'" does "not include agricultural stormwater discharges"); *id.* § 1314(f)(A) ("nonpoint sources of pollutants" include "silvicultural activities" such as "runoff" from "forest lands"); *id.*, § 1288(b)(2)(F) (requiring EPA to assist states to develop "procedures and methods," including "land use requirements," to control "silviculturally related non-point sources of pollution").

Accordingly, EPA has repeatedly stated for more than 35 years that forest road precipitation runoff does not become a point source when it is channeled. 40 Fed. Reg. 56932 (Dec. 5, 1975) ("whether or not the rainfall happens to collect"—as "silvicultural runoff * * * frequently flows into ditches"—it is "properly regulated [as] nonpoint in nature and should not be covered by the NPDES permit

program"); 41 Fed. Reg. 6282 (Feb. 12, 1976) ("ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program"); 55 Fed. Reg. 20521, 20522 (May 17, 1990) (runoff from forest roads, "although sometimes channeled," remains "non-point source in nature"); Pet. App. 86a & n.4 (EPA Br., Nov. 17, 2003) (Silvicultural Rule excludes runoff from silvicultural activities "regardless of whether they" discharge through "'conduits and channels'"); U.S. Brief to Ninth Cir., at 25 (Dec. 6, 2006) ("EPA has made it clear that the term 'natural runoff' in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts").

EPA has explained why it takes this position: pollutants in forest road runoff are "induced by natural processes, including precipitation," are "not traceable to any discrete and identifiable facility," and are "better controlled through the utilization of best management practices." Pet. App. 21a, quoting 41 Fed. Reg. 24710 (June 18, 1976); see also 55 Fed. Reg. at 20522 (point source treatment of "channeled" runoff is inappropriate because it is caused by "natural processes," "not otherwise traceable to any single identifiable source," and "best treated by non-point source controls"); Pet. App. 114a ("ditches" and "culverts" are "an integral part of forest roads," which would "wash out" without them). That is "a sufficiently rational" explanation for EPA's approach "to preclude a court from substituting its judgment for that of EPA." *Chemical Mfrs.*, 470 U.S. at 125.

Respondent cites not a single instance in which EPA has required a permit for channeled forest road

runoff. NEDC's argument that EPA must do so depends on ignoring the text of the regulation, numerous interpretative and explanatory statements in the regulatory record, decades of consistent agency practice, and the decisions of this Court, which establish that deference is required to EPA's expert judgment.

4. NEDC wrongly contends (at 1) that certiorari is inappropriate because the Ninth Circuit made a "non-final ruling that sustains a complaint under Rule 12(b)(6)." This Court frequently grants certiorari in cases where the opinion below resolved an important issue, otherwise worthy of review, and a decision would hasten or finally resolve the litigation. See, *e.g.*, *F. Hoffmann-La Roche, Inc.* v. *Empagran S.A.*, 542 U.S. 155 (2004); *Santa Fe Indus.* v. *Green*, 430 U.S. 462 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); E. GRESSMAN ET AL., SUPREME COURT PRACTICE 282 (9th ed. 2007).

The Ninth Circuit squarely held that "stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which an NPDES permit is required." Pet. App. 47a. Whether that ruling is erroneous is a purely legal question that can efficiently be resolved by this Court. Because reversal of that ruling would end this litigation, the question presented is appropriate for review. NEDC's assertion that petitioners' concerns can be addressed in the district court on remand or at the NPDES permitting stage misses the point: petitioners should not be subject to a permitting requirement, or be required to litigate in district court about such issues as who among the owners and many users of roads is responsible for obtaining

permits. The Ninth Circuit's decision is a final one on an important legal question that determines whether this litigation continues, and whether a massive new permitting regime is set in motion. It is ripe for this Court's review.

5. NEDC contends (at 33) that petitioners have waived the argument that the Clean Water Act's definition of "point source" to exclude "agricultural stormwater discharges" encompasses silvicultural stormwater discharges. 33 U.S.C. § 1362(14). That argument is besides the point, because EPA's reading of the statute is reasonable regardless of whether the agricultural stormwater provision applies. It is also incorrect. The Ninth Circuit analyzed the agricultural stormwater provision, and found that it did not support EPA's position that forest road runoff is nonpoint source. Pet. App. 14a-16a, 44a. Because the Ninth Circuit ruled on this issue, it is appropriate for review. See E. GRESSMAN ET AL., SUPREME COURT PRACTICE at 464-465; *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

NEDC cannot deny that silviculture is a form of agriculture. See Pet. 17; U.S. Br., Pet. App. 124a n.19 ("Forestry roads and silvicultural harvesting more closely resemble agricultural land uses than industrial ones"). And Congress specifically mentions silviculture along with agriculture in Sections 1288(b)(2)(F) and 1314(f)(2)(A). There is no reason to think that Congress omitted this very important area of agriculture from the scope of Section 1362(14).

6. NEDC cannot make the conflicts between the Ninth and other circuits disappear. Opp. 15-19. The

Eighth Circuit reached precisely the opposite result in *Newton County Wildlife*, where, like here, environmental groups argued that the Silvicultural Rule must be interpreted to require NPDES permits for discharges from "logging-road stream crossings" and "culverts." Br. of Appellants, No. 97-1852 (8th Cir. filed July 9, 1997), at 41-43. The Eighth Circuit held that argument to be "without merit" under its (correct) reading of the Silvicultural Rule. 141 F.3d at 810. Thus the issue was cleanly presented and decided. That Judge Loken's opinion disposes of it in short order reflects the weakness of the argument that 35 years of consistent interpretation and practice by the expert agency should be overridden—not any lack of care on the Eighth Circuit's part.

Contrary to NEDC's assertion (at 17) that the *Newton* court did not consider "discharges," the opinion explicitly addresses "discharges of pollutants that will accompany logging and road construction." 141 F.3d at 810. It is irrelevant that the Eighth Circuit did not consider EPA's Phase I regulations. Opp. 17. Those regulations expressly exempt from permitting all "discharges" that are "excluded from the NPDES program" under the Silvicultural Rule—and the Eighth Circuit held the Silvicultural Rule defines channeled forest road runoff as a nonpoint source not subject to permitting. Under *Newton*, the Eighth Circuit would have ruled for petitioners in this case.

In *Conservation Law Foundation*, 327 F. Supp. 2d 325, aff'd, 139 F. App'x 3381, the Second Circuit summarily affirmed the district court's ruling that permits were not required for channeled stormwater discharges from a commercial property that were not covered by Phase I or Phase II regulations. NEDC's

response (at 18) that EPA's Phase I regulations do require permits for channeled forest road runoff begs the question. EPA has repeatedly "confirmed that forestry roads are not covered by the phase I regulations." U.S. Br., Pet. App. 126a. In *CLF* the court recognized that Congress "grant[ed] EPA discretion to determine that certain stormwater discharges require regulation while others do not." 327 F. Supp. 2d at 330. The *CLF* court would have upheld EPA's exercise of discretion here.

Respondent also misses the point with *Closter Farms*, 300 F.3d 1294. The Eleventh Circuit squarely held that defendants did not lose the benefit of the agricultural stormwater provision because the stormwater was channeled rather than discharging to navigable waters as sheet flow. *Id.* at 1297. Likewise, collection in ditches and culverts does not change the nature of forest road runoff, as EPA has explained. *E.g.*, Pet. App. 113a-114a.

NEDC makes no attempt to explain how it was logical for the Ninth Circuit to hold here that forest road runoff is subject to Phase I permitting, yet to have remanded in *Environmental Defense Center*, 344 F.3d at 862, for EPA to explain its decision not to regulate that runoff under Phase II—a remand that would have been unnecessary if Phase I required permits. See also *Association to Protect Hammersley*, 299 F.3d at 1018-1019 (holding EPA has "power under the Act to define point sources" and refusing to "undermine the agency's interpretation").

These conflicts, the conflict with *Chevron*, *Auer*, and other decisions of this Court requiring deference to federal agency interpretations, and the importance

of the question presented all call for immediate review.[1] Because the views of the federal government have been set forth extensively in regulatory material and briefs for many years, there is no need to call for the views of the Solicitor General before granting certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[1] As argued in our petition and elaborated in the petition and reply in No. 11-338 and the amicus brief of NAFO, the Ninth Circuit erred in exercising citizen-suit jurisdiction, an important issue that also warrants this Court's review.

Nos. 11-338 and 11-347

In the Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, ET AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

GEORGIA-PACIFIC WEST, INC., ET AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that a suit in which liability depends on the interpretation of Clean Water Act (CWA) regulations, and in which the court rejected the construction of the regulations proffered by the Environmental Protection Agency (EPA), may be adjudicated under the CWA's citizen-suit provision, 33 U.S.C. 1365(a), rather than under the CWA's judicial-review provision, 33 U.S.C. 1369(b).

2. Whether the court of appeals erred in not deferring to EPA's interpretation of the Silvicultural Rule, 40 C.F.R. 122.27(b)(1), that channeled runoff from logging roads does not constitute a point-source discharge.

3. Whether the court of appeals erred in not deferring to EPA's interpretation of the Phase I industrial stormwater regulation, 40 C.F.R. 122.26(b)(14), that channeled runoff from logging roads does not constitute a stormwater discharge "associated with industrial activity."

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In the Supreme Court of the United States

No. 11-338

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, ET AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

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NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

1. a. Section 301(a) of the Clean Water Act (CWA or Act) prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to navigable waters from any point source—except "as in compliance with" specified pro-

visions of the Act. 33 U.S.C. 1311(a), 1362(12). The Act defines "point source" as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. 1362(14). For most point-source discharges, regulated entities achieve compliance by obeying the terms of a permit issued under the National Pollution Discharge Elimination System (NPDES) pursuant to CWA Section 402, 33 U.S.C. 1342. Other CWA provisions address "nonpoint sources" through methods other than the NPDES program. See, *e.g.*, 33 U.S.C. 1314(f), 1329.

b. The Environmental Protection Agency (EPA) has promulgated regulations that further define the term "point source" as it applies to various activities and facilities. EPA's Silvicultural Rule defines "silvicultural point source" as "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States." 40 C.F.R. 122.27(b)(1). The Rule excludes from the definition "nonpoint source silvicultural activities such as * * * road construction and maintenance from which there is natural runoff." *Ibid.* EPA has construed that rule to exclude from NPDES permitting requirements all precipitation-driven runoff from the specified nonpoint sources, including logging roads, even if the runoff flows through a ditch, channel, or culvert before being released into navigable waters. See 2007 Gov't C.A. Amicus Br. 10.

c. In 1987, recognizing the special regulatory problems posed by stormwater discharges, Congress amended the CWA. Pub. L. No. 100-4, 101 Stat. 52 (1987 CWA amendments). CWA Section 402(p) establishes a phased process, commonly referred to as Phase I and Phase II, for the regulation of stormwater point-source discharges. 33 U.S.C. 1342(p).

Phase I covers various enumerated sources of stormwater pollution, see 33 U.S.C. 1342(p)(2), including discharges of stormwater "associated with industrial activity," 33 U.S.C. 1342(p)(2)(B). The 1987 CWA amendments required NPDES permits for those discharges and directed EPA to regulate them accordingly. 33 U.S.C. 1342(p)(3) and (4). The CWA does not define the term "storm water discharge associated with industrial activity." In 1990, EPA promulgated Phase I regulations that define the term as

> the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from * * * immediate access roads * * * used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility[.] * * * The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14): * * * (ii) Facilities classified as Standard Industrial Classifications 24 (except 2434).

40 C.F.R. 122.26(b)(14).

For stormwater discharges other than those enumerated in 33 U.S.C. 1342(p)(2), the CWA authorizes EPA to designate, as part of Phase II, any additional stormwater discharges "to be regulated to protect water quality." 33 U.S.C. 1342(p)(5) and (6). For Phase II discharges, EPA must "establish a comprehensive program," which "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." 33 U.S.C. 1342(p)(6). EPA is authorized to require NPDES permits for Phase II discharges, but it is not required to do so. *Ibid.* In 1999, EPA promulgated regulations that designated two categories of stormwater point-source discharges (neither of which is relevant to this case) for Phase II regulation. 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999) (codified in pertinent part at 40 C.F.R. 122.26(a)(9)(i)). EPA also reserved the authority to designate additional discharges for Phase II regulation at a later date. *Ibid.*[1]

2. Respondent commenced this action under the CWA's citizen-suit provision, 33 U.S.C. 1365. Respondent alleged that stormwater discharges associated with two

[1] In 2003, the Ninth Circuit remanded to EPA the question whether to regulate stormwater discharges from forest roads under Phase II. See *Environmental Def. Ctr.* v. *EPA*, 344 F.3d 832, 863, cert. denied, 541 U.S. 1085 (2004). EPA continues to review available information on the water-quality impacts of stormwater discharges from forest roads, including logging roads, as well as existing practices to control those discharges. On May 23, 2012, EPA announced that it "is considering designating a subset of stormwater discharges from forest roads for appropriate action" under the agency's Phase II rulemaking authority. *Notice of Intent To Revise Stormwater Regulations To Specify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges*, 77 Fed. Reg. 30,479; see pp. 17-18, *infra*.

logging roads in Oregon violate the Act because the roads at issue collect, channel, and discharge stormwater runoff to navigable waters—without NPDES permits—via ditches, pipes, and culverts. First Am. Compl. 2-4, 17-18, 21-24.

Petitioners are state officials and private timber companies who control the relevant logging roads and were named as defendants in this suit. Supported by the United States as amicus curiae, petitioners moved to dismiss the complaint for failure to state a claim. The district court granted the motion. The court held that, under EPA's Silvicultural Rule, 40 C.F.R. 122.27(b)(1), the logging roads had been categorized as nonpoint sources of natural runoff, and that stormwater discharges from those roads therefore were not subject to NPDES permitting requirements. Pet. App. 53-77.[2]

3. The court of appeals reversed. Pet. App. 1-52.[3]

a. As in the district court, the government filed an amicus brief arguing that, under EPA's Silvicultural Rule, all precipitation-driven runoff from logging roads is excluded from NPDES permitting requirements, even if it flows through a ditch, channel, or culvert before being discharged into navigable waters. See 2007 Gov't C.A. Amicus Br. 10. The court of appeals rejected that interpretation of the regulation. Pet. App. 34-37. The court stated that "there are two possible readings of the Silvicultural Rule," and it acknowledged that the interpretation advanced in the government's amicus brief "reflects the intent of EPA in adopting the Rule." *Id.* at 36. The court concluded, however, that an

[2] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 11-338.

[3] The initial court of appeals opinion was published at 617 F.3d 1176, but the discussion in this brief cites the superseding opinion, which was published at 640 F.3d 1063 and is reprinted in the petition appendix.

alternative reading of the rule was preferable because it would "allow [the court] to construe the Rule to be consistent with the statute," in particular, the CWA's definition of "point source." *Id.* at 37. The court held that the Silvicultural Rule does not encompass stormwater runoff from logging roads that is systemically collected and channeled through man-made ditches and culverts before being discharged into waters of the United States. *Ibid.*

b. Petitioners and the United States further argued that, even if such channeled runoff from logging roads constitutes a "point source" discharge, such discharges are not subject to NPDES permitting requirements under EPA's stormwater regulations promulgated pursuant to 33 U.S.C. 1342(p). Pet. App. 37-48. Petitioners and the government contended, in particular, that the discharges at issue here are not "associated with industrial activity" as EPA has defined that term. See *id.* at 44-47; 40 C.F.R. 122.26(b)(14). The court of appeals rejected that understanding of EPA's regulatory definition. The court found it "undisputed that 'logging,' which is covered under SIC [Standard Industrial Classification] subcategory 2411 (part of SIC 24), is an 'industrial activity.'" Pet. App. 44-45. The court construed the regulation's reference to "immediate access roads"—defined in EPA's preamble to mean "roads which are exclusively or primarily dedicated for use by the industrial facility"—as covering the logging roads at issue here. *Id.* at 45-47.

4. a. Petitioners filed petitions for rehearing in the court of appeals. The court of appeals thereafter ordered a response and posed two threshold questions: (1) "Can a suit challenging EPA's interpretation of its regulations implementing the Clean Water Act's permitting requirements be brought under the Act's citizen suit provision, 33 U.S.C. 1365(a)?" (2) "Must a suit challenging EPA's deci-

sion to exempt the discharge of a pollutant from the Clean Water Act's permitting requirements be brought under the Act's agency review provision, 33 U.S.C. 1369(b)?" 10/21/10 Order.

Section 1369(b) authorizes private parties to obtain direct court of appeals review of certain EPA actions, including actions taken in "promulgating any effluent limitation or other limitation under section 1311" or "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(E) and (F). EPA's NPDES regulations are generally subject to immediate appellate review under that provision. See, *e.g.*, *NRDC* v. *EPA*, 673 F.2d 400, 404-406 (D.C. Cir.), cert. denied, 459 U.S. 879 (1982) (citing *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977)); *NRDC* v. *EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992). Such review must be sought within 120 days of the relevant EPA action, unless a challenge is "based solely on grounds which arose after such 120th day." 33 U.S.C. 1369(b)(1). Any EPA action "with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2).

In response to the court of appeals' questions, the United States filed another amicus brief. The government expressed the view that, although Section 1369(b)(2) would preclude the court in a Section 1365(a) citizen suit from *invalidating* the EPA regulations implicated by this case, Section 1369(b)(2) did not preclude the court from *interpreting* those regulations in a manner different from the interpretations advanced in the government's prior amicus brief on the merits. See 2011 Gov't C.A. Amicus Br. 7-11.

b. The court of appeals denied rehearing and issued a superseding panel opinion. Pet. App. 1-52; see n.3, *supra*. In a new section entitled "Subject Matter Jurisdiction," the

court agreed with the position set forth in the government's rehearing brief that Section 1369(b) "does not bar a citizen suit challenging EPA's Silvicultural Rule interpretation first adopted in its initial amicus brief in this case." Pet. App. 8-10. The court adhered to the remainder of its previous opinion.

DISCUSSION

The court of appeals correctly rejected petitioners' jurisdictional challenge to this citizen suit, since the dispute between the parties concerns the proper *interpretation*, rather than the *validity*, of the EPA regulations at issue here. On the merits, the court erred in failing to give appropriate deference to EPA's interpretation of its own regulations. That error, however, does not warrant this Court's review.

No square circuit conflict exists on the questions presented in the certiorari petitions. And while the court of appeals construed EPA's current Phase I industrial stormwater regulation to require NPDES permits for channeled stormwater discharges associated with logging roads, the court did not hold that the CWA compels that result. Congress has temporarily barred EPA from implementing the court of appeals' decision, and EPA has announced its intent to amend expeditiously its Phase I regulation to make clear that discharges of the sort at issue here do not require NPDES permits. Those developments address petitioners' concerns about the practical burdens that the court's ruling could entail. The petitions for writs of certiorari therefore should be denied.

A. The CWA Confers Jurisdiction Over This Citizen Suit

A citizen suit under Section 1365(a) may be brought against a person or entity alleged to be violating the CWA by, *inter alia*, discharging pollutants into navigable waters

without an NPDES permit. 33 U.S.C. 1365(a) and (f)(1); see 33 U.S.C. 1311(a). Section 1369(b), by contrast, provides for immediate review of various EPA actions, including the promulgation of NPDES regulations. 33 U.S.C. 1369(b)(1); see p. 7, *supra*. A review proceeding under Section 1369(b)(1) must be commenced within 120 days of the challenged EPA action, unless the basis for the suit arises after that period. *Ibid.* Any EPA action that could have been challenged under Section 1369(b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2).

The court of appeals correctly held that Section 1369(b)(2) did not preclude the courts below from exercising jurisdiction over this citizen suit. See Pet. App. 8-10. Petitioners premise their jurisdictional challenge on the assertion that the court of appeals invalidated an EPA rule. 11-338 Pet. 19-24. If the court had taken that step, its decision would have run afoul of Section 1369(b)(2), since the pertinent EPA regulations could have been challenged at the time those rules were promulgated. See 2011 Gov't Amicus Br. 6-7; Br. in Opp. 19-24.

Contrary to petitioners' contention, however, the court of appeals did not expressly or implicitly invalidate either the Silvicultural Rule or the EPA regulation that defines the term "stormwater discharge associated with industrial activity." Rather, the court of appeals simply interpreted those regulations in a manner different from the constructions advanced in the government's amicus brief. See Pet. App. 36-37, 44-47. To be sure, in choosing between two competing interpretations of the Silvicultural Rule, the court was significantly influenced by its view that the Rule would be contrary to the CWA if EPA's interpretation were adopted. See *id.* at 36-37. But just as a court does not invalidate a statute by construing it to avoid perceived consti-

tutional difficulties, the court of appeals did not invalidate the Silvicultural Rule by adopting the interpretation that the court viewed as necessary to achieve compliance with the governing statute. Cf. *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 573, 581 (2007) (distinguishing, for purposes of an analogous Clean Air Act judicial-review provision, "between a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals's view of the statute, and a determination that the regulation as written is invalid"). And because EPA did not announce its official reading of the Silvicultural Rule at the time of the rule's promulgation, respondent could not reasonably have been expected to challenge that potential reading under Section 1369(b)(1) at that time. Pet. App. 9-10; see 2011 Gov't Amicus Br. 7-11 & n.5.[4]

The decisions cited by the state petitioners (11-338 Pet. 20) simply reiterate the undisputed propositions that challenges to the validity of an EPA rule promulgated under the CWA must be brought pursuant to Section 1369(b)(1), and that a court may not invalidate an EPA rule in a citizen suit brought under Section 1365(a). None of those decisions suggests that the court in a CWA citizen suit is foreclosed from either (a) rejecting EPA's construction of its own rule, or (b) adopting a competing construction that the court views as necessary to render the rule consistent with the statute. Because the court below did not explicitly or implicitly invalidate any EPA rule, the precedents on which

[4] The industry petitioners argue (11-347 Pet. 23 n.2) that EPA had officially interpreted the term "natural runoff" in the Silvicultural Rule as including runoff that is systematically channeled well before the government filed its amicus brief in this case. The court of appeals rejected that contention (Pet. App. 9), and that aspect of the court's analysis raises no legal issue of recurring importance.

the state petitioners rely are inapposite. Further review of this issue is not warranted.

B. The Court Of Appeals Erred In Failing To Defer To EPA's Interpretations Of Its Regulations Advanced In The Government's Amicus Brief

In a CWA citizen suit, a court determines whether the defendant's discharges violate the requirements of the CWA and applicable regulations. 33 U.S.C. 1365(a) and (f). In making that determination, the court must defer to EPA's regulatory construction of an ambiguous CWA provision unless that interpretation conflicts with the statute. See *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 841-844 (1984); cf. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). When the legality of a citizen-suit defendant's conduct turns on the interpretation of EPA regulations, the court similarly must defer to EPA's construction of its own rule unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997) (citation omitted). An agency's reasonable interpretation of its regulation, as presented in an amicus brief, is entitled to *Auer* deference. See, *e.g.*, *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880 (2011).

1. The legality of petitioners' conduct depends in part on whether stormwater runoff from a logging road constitutes a "point source" discharge within the meaning of the CWA if the runoff is collected and channeled through pipes, ditches, or culverts before entering waters of the United States. In resolving that question, the court of appeals should have given *Chevron* deference to EPA's Silvicultural Rule, which provides that "non-point source silvicultural activities such as * * * road construction and maintenance from which there is natural runoff" are excluded from the definition of "silvicultural point source." 40 C.F.R.

122.27(b)(1). The CWA's broad definition of "point source" under Section 502(14) gives EPA at least some discretion in distinguishing between point and nonpoint sources. In particular, "the concept of a 'discrete conveyance'" contained in the statutory definition "suggests that there is room here for some exclusion by interpretation" by the agency. *NRDC* v. *Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977); see *id.* at 1382 ("[T]he power to define point and nonpoint sources is vested in EPA and should be reviewed by the court only after opportunity for full agency review and examination.") (citation and internal quotation marks omitted).

Although the Silvicultural Rule does not specifically confirm that the reference to "natural runoff" includes systematically *channeled* runoff, neither does it suggest that such runoff should be treated as a "point source" discharge. To the extent that the absence of any specific reference to channeled runoff renders the Silvicultural Rule ambiguous, the court of appeals should have deferred under *Auer* to EPA's interpretation of its own Rule provided in the government's amicus brief. That brief unequivocally expressed EPA's view that "the term 'natural runoff' in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts." 2007 Gov't Amicus Br. 25.[5]

2. The court of appeals should also have deferred to EPA's interpretation of its Phase I industrial stormwater regulation. Properly construed, that regulation provides an independent basis for concluding that, under the current

[5] In its recent Federal Register notice, EPA stated that it is considering the possibility of regulating a subset of stormwater discharges from forest roads under its Phase II stormwater rulemaking authority. 77 Fed. Reg. at 30,479; see pp. 17-18, *infra*.

regulatory scheme, petitioners were not required to obtain an NPDES permit for any of the activities at issue here.

To identify the categories of "facilities" that are engaged in "industrial activity," EPA's Phase I regulation incorporates by reference Standard Industrial Classifications (SIC) codes, including SIC code 24, of which "logging" is a subcategory. 40 C.F.R. 122.26(b)(14)(ii). In its amicus brief below, the government explained that "EPA primarily referenced this SIC code to regulate traditional *industrial* sources such as sawmills." 2007 Gov't C.A. Amicus Br. 29. The government further explained that, "[b]y not excluding SIC code 2411 (the logging subcategory), EPA intended to reference only the four categories of silvicultural facilities it had already defined as point sources in" the Silvicultural Rule—*i.e.*, rock crushing, gravel washing, log sorting, and log storage. *Id.* at 29-30.[6] Those facilities are more closely associated with traditional industrial activities than are logging roads, which are often used for recreational purposes rather than as "immediate access roads" to those facilities. See *id.* at 31. EPA's interpretation is also consistent with the terms of SIC code 2411, which defines "logging" facilities as "*[e]stablishments* primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials . . . in the field." Pet. App. 45 (emphasis added).

In concluding that the discharges at issue here are "associated with industrial activity" within the meaning of EPA's current Phase I rule (Pet. App. 42-47), the court of appeals ignored EPA's construction of its own regulation.

[6] That understanding is buttressed by the fact that EPA's definition of "storm water discharge associated with industrial activity" expressly exempts activities that are "excluded from the NPDES program under this part 122," 40 C.F.R. 122.26(b)(14), including under the Silvicultural Rule, 40 C.F.R. 122.27.

The interpretation set forth in the government's amicus brief did not clearly conflict with the text of the regulation. Nor did the court of appeals hold that its expansive construction of the term "associated with industrial activity" was necessary to bring EPA's Phase I regulation into conformity with the statute. In adopting a construction of the regulation that was inconsistent with EPA's own stated understanding of the rule, the court of appeals misapplied established *Auer* deference principles.

C. This Case Does Not Warrant Further Review

Notwithstanding the court of appeals' errors on the merits, the decision below does not warrant this Court's review. The decision does not create a square conflict among the courts of appeals. And while application of NPDES permitting requirements to petitioners' stormwater discharges could entail significant practical burdens if the current regulatory scheme remained unchanged, those concerns are being addressed by both Congress and EPA—entities with greater institutional capacity to resolve the complex regulatory issues involved.

1. There is no conflict among the courts of appeals warranting further review

a. As discussed above (see pp. 10-11, *supra*), the Ninth Circuit's jurisdictional analysis does not conflict with other court of appeals decisions holding that Section 1369(b) provides the exclusive CWA avenue to review the validity of an EPA rule implementing the NPDES permitting system. The court of appeals did not invalidate an EPA regulation explicitly or implicitly. Rather, it interpreted the pertinent EPA rules as requiring NPDES permits for the type of discharges at issue, as urged by respondent in this Section 1365(a) citizen suit. *Ibid.*; see Br. in Opp. 19-26. Although the court of appeals' interpretations of those rules were

flawed on the merits, the court did not err in entertaining the suit.

b. The industry petitioners allege (11-347 Pet. 25-26) a conflict between the court of appeals' interpretation of the Silvicultural Rule and that of the Eighth Circuit in *Newton County Wildlife Ass'n* v. *Rogers*, 141 F.3d 803 (1998). The court in *Rogers* held that the Forest Service's failure to obtain an NPDES permit before contracting with others to harvest timber and build roads did not constitute an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 141 F.3d at 810. The court relied principally on the rationale that the private operator, not the Forest Service, would be responsible for obtaining any required permit. *Ibid.* (citing 40 C.F.R. 122.21(b)). The Eighth Circuit added that "EPA regulations do not include the logging and road building activities cited by [plaintiff] in the narrow list of silvicultural activities that are point sources requiring NPDES permits." *Ibid.* (citing, *inter alia*, 40 C.F.R. 122.27(b)(1)). But that single, passing statement was simply dictum, and it did not specifically refer to the sort of *channeled* runoff at issue in this case. See *ibid.*; see also Br. in Opp. 16-17.

c. The court below is the first court of appeals to address whether EPA's Phase I industrial stormwater regulation, 40 C.F.R. 122.26(b)(14), requires permits for the type of discharges at issue. See Br. in Opp. 15-16. Contrary to the industry petitioners' suggestion (11-347 Pet. 26-27), the decision below does not conflict with the Second Circuit's unpublished summary affirmance of the district court's decision in *Conservation Law Foundation* v. *Hannaford Bros. Co.*, 327 F. Supp. 2d 325 (D. Vt. 2004), aff'd, 139 Fed. Appx. 3381 (2005). In *Conservation Law Foundation*, the district court held that a shopping plaza owner was not liable under the CWA for stormwater discharges from the

plaza's parking lot. *Id.* at 330-335. Because the parties agreed that the parking-lot discharges were not covered by either Phase I or Phase II rules, however, the court had no occasion to consider whether the discharges were in fact regulated by EPA's stormwater rules—the relevant question here. *Id.* at 330 ("[Plaintiff] does not contend that the [plaza] falls into the categories of stormwater discharges required to obtain a permit under the Phase I and Phase II rules. Therefore, the question before the Court is whether § 301(a) of the CWA prohibits the [plaza] from discharging stormwater without an NPDES permit even though neither EPA nor [the responsible state agency] require the [plaza] to obtain a NPDES permit.").

2. Both Congress and EPA have taken steps to mitigate petitioners' practical concerns about the effects of the decision below

Petitioners contend that, by requiring NPDES permits for a potentially vast number of logging-road discharges, the decision below threatens to impose significant compliance burdens on both regulators and the timber industry. 11-338 Pet. 24-28; 11-347 Pet. 30-35. Congress and EPA have already taken steps, however, to address those concerns.

a. Congress has suspended the permitting requirement imposed by the court of appeals' decision:

> From the date of enactment of this Act until September 30, 2012, the Administrator of the Environmental Protection Agency shall not require a permit under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from roads, the construc-

> tion, use, or maintenance of which are associated with silvicultural activities.

Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, Div. E, § 429, 125 Stat. 1046-1047. That legislation provides breathing space for EPA to fashion an administrative response to the court of appeals' decision. Permanent legislation is also pending in both the Senate and the House of Representative that would amend Section 402 so as to not require NPDES permits for stormwater discharges resulting from silvicultural activities. H.R. 2541, S. 1369, 112th Cong., 1st Sess. (2011).

b. The court of appeals held that, if the Silvicultural Rule were construed to designate channeled runoff from logging roads as a "nonpoint source," the Rule would be inconsistent with the CWA's definition of "point source." Pet. App. 36-37. Under the 1987 CWA amendments, however, not all point-source discharges of stormwater runoff require NPDES permits. See pp. 3-4, *supra*. And while the court below held that the discharges at issue here are "associated with industrial activity" as EPA's current regulations define that term, see Pet. App. 44-47, the court did not suggest that the CWA requires EPA to take that approach. See, *e.g.*, *id.* at 46 ("The [Phase I regulation's] definition of a 'facility' engaging in 'industrial activity' is very broad."). The court's decision thus leaves EPA free to amend its Phase I regulations to make clear that runoff from logging roads is not "associated with industrial activity" and therefore is not subject to NPDES permitting requirements.

On May 23, 2012, EPA issued a formal notice in the Federal Register indicating its intent "to propose revisions to its Phase I stormwater regulations (40 CFR 122.26) to specify that stormwater discharges from logging roads are not included in the definition of 'storm water discharge as-

sociated with industrial activity.'" 77 Fed. Reg. at 30,474. As that notice explains, "[t]he effect of this revision would be to remove any obligation for an owner or operator of a logging road that has discharges of stormwater to waters of the United States to seek" an NPDES permit for such a discharge. *Ibid.* The notice further explains that "EPA is aware that a Congressional moratorium on NPDES permitting of some logging roads is set to expire on September 30, 2012, and intends to move expeditiously to complete this revision." *Ibid.*

The notice also states that EPA intends further study and seeks public comment on "alternative approaches for addressing stormwater discharges from forest roads." 77 Fed. Reg. at 30,479. Among those alternatives, "EPA is considering designating a subset of stormwater discharges from forest roads for appropriate action under section 402(p)(6) of the Act," *i.e.*, its Phase II regulatory authority, which "allows the EPA flexibility in issuing regulations to address designated stormwater discharges and does not require the use of NPDES permits." *Ibid.*

By clarifying that channeled stormwater discharges from logging roads are not "associated with industrial activity," EPA's proposed regulatory approach would render moot petitioners' objections to the court of appeals' conclusion that such discharges are subject to NPDES permitting requirements under the current regulatory scheme. EPA's proposed approach would also facilitate further inquiry concerning possible alternative measures that would mitigate the environmental impacts giving rise to respondent's suit. If an interested party is unhappy with the ultimate outcome of EPA's rulemaking process, any new rule will be subject to direct judicial review pursuant to 33 U.S.C. 1369(b) on the agency's developed administrative record.

If the Court grants certiorari in this case, however, it will be faced with a binary choice: either hold that the stormwater discharges at issue here are not subject to CWA regulation at all (as petitioners contend), or hold that the discharges require NPDES permits (as respondent argues). In authorizing EPA to engage in Phase II regulation, Congress sought to obviate the need for that all-or-nothing choice, and to expand the range of regulatory options available to the agency. And because any decision this Court might issue would focus on EPA's *current* regulatory framework, that decision could be superseded by further regulatory action. If the Court reversed the court of appeals and held that the discharges at issue do not require NPDES permits under the Phase I regulations because they are not "associated with industrial activity," EPA could impose alternative regulatory requirements under the more flexible Phase II provisions of the 1987 CWA amendments, see 33 U.S.C. 1342(p)(6). Alternatively, if the Court upheld the court of appeals' determination that the discharges at issue are covered by the current Phase I industrial stormwater regulation, EPA could still revise that regulation (in accordance with its recent Federal Register notice) to exclude those discharges from the NPDES requirement. For these reasons, review by this Court to consider the proper interpretation of EPA's current regulatory scheme would neither represent a sound use of the Court's resources nor definitively resolve the legal status of channeled stormwater discharges from logging roads.

Even before Congress suspended the permitting requirement imposed by the court of appeals' decision, EPA had taken steps to alleviate petitioners' immediate practical concerns by making available, as appropriate, the Multi-Sector General Permit (MSGP) for discharges associated with industrial activities, 73 Fed. Reg. 56,572 (Sept. 29,

2008), to persons responsible for channeled runoff from logging roads. See Letter from Nancy K. Stoner, Acting Assistant Administrator, EPA, to Congressman Kurt Schrader (July 1, 2011). *Inter alia*, the MSGP allows permit holders to select their own methods for reducing discharges to meet narrative effluent limitations. 73 Fed. Reg. at 56,574-56,576. The MSGP could apply to groups of roads and could considerably lessen the administrative burdens associated with obtaining separate permits for each individual road or discharge. See 40 C.F.R. 122.28. Although the MSGP is available only in States where EPA is the permitting authority, other States authorized to issue NPDES permits may choose to make available a similar general permit.

* * * * *

In light of the significant attention directed by Congress and EPA to the regulation of stormwater discharges from logging roads in response to the court of appeals' decision, this Court's intervention is not warranted. The complex regulatory issues implicated by the decision below are currently being addressed in the first instance, and can be addressed more definitively and in a more nuanced fashion, by Congress and the expert agency.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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MAY 2012

Nos. 11-338, 11-347

In the
Supreme Court of the United States

DOUG DECKER, in His Official Capacity as Oregon State Forester, *et al.*, *Petitioners*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*, *Respondents*.

GEORGIA-PACIFIC WEST, INC., *et al.*, *Petitioners*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER., *et al.*, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF ALABAMA FORESTRY ASSOCIATION, et al., IN SUPPORT OF PETITIONERS

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AMERICAN LOGGERS COUNCIL, ASSOCIATED LOGGING CONTRACTORS-IDAHO, ASSOCIATED OREGON LOGGERS, BUCKEYE CONSERVANCY, CALIFORNIA FORESTRY ASSOCIATION, FOREST LANDOWNERS ASSOCIATION, KENTUCKY FOREST INDUSTRIES ASSOCIATION, MISSISSIPPI FORESTRY ASSOCIATION, MISSOURI FOREST PRODUCTS ASSOCIATION, NORTH CAROLINA FORESTRY ASSOCIATION, NORTHERN ARIZONA LOGGERS ASSOCIATION, OHIO FORESTRY ASSOCIATION, OREGON WOMEN IN TIMBER, SOUTHEASTERN LUMBER MANUFACTURERS ASSOCIATION, TEXAS FORESTRY ASSOCIATION, TREATED WOOD COUNCIL, VIRGINIA FOREST PRODUCTS ASSOCIATION, AND WASHINGTON CONTRACT LOGGERS ASSOCIATION, INC.

QUESTION PRESENTED

Whether the Ninth Circuit should have deferred to EPA's long-standing position that channeled runoff from forest roads does not require a federal NPDES permit under the Clean Water Act, and erred when it mandated that EPA must regulate such runoff as industrial storm water subject to the Clean Water Act.

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IDENTITY AND INTEREST OF AMICI CURIAE

Under Supreme Court Rule 37, Amici respectfully submit this brief in support of Petitioners Doug Decker, Oregon State Forester, *et. al.*, 11-338, and Georgia-Pacific West, Inc., *et. al.*, 11-347 (consolidated).[1]

The Amici organizations hail from all over the country and represent forest landowners, wood producers, conservationists, educators, and others. Many Amici are involved in developing, using, or maintaining forest roads. They have joined this brief because of their justifiable fear that the Ninth Circuit decision will unnecessarily change forest practices nationwide at great expense but with no added benefit to the environment.

The Alabama Forestry Association was organized in 1949 to promote good stewardship of renewable forest resources for the benefit of the Nation. The Association pursues this goal through public outreach, safety training, industry communications, legislative advocacy, and policy development. The Association has more than 1,800 dues-paying members, including landowners, foresters, trucking companies, and wood product producers. The Association represents the

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[1] In accordance with Rule 37, all parties have been given timely notice of Amici's intent to participate in this case and all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

Also, under Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel have made a monetary contribution to the brief's preparation or submission.

State's largest industry that supports over 400,000 forest landowners with an estimated $15 billion in products from over 650 producers.

The American Loggers Council was formed in 1994 to serve as a national voice for professional loggers. The Council is made up of a coalition of regional and state logging associations and councils and represents more than 50,000 employees and reaches over 10,000 logging contractors. Through networking and outreach, the Council seeks to enhance the logging profession and further sustainable forestry practices.

Associated Logging Contractors-Idaho is a trade organization of logging contractors. It currently has close to 400 logging contractor businesses as members and an additional 100 associate members who are affiliated with the timber industry and logging contractors. Its member companies are small, family-owned, or closely held businesses that operate on the forest lands of Idaho. Many are multi-generational businesses with close ties to the land and their communities. The Idaho forest industry makes up 4.6% of the total labor income in the state and produces $2 billion in annual sales of primary wood and paper products. The forest industry is an essential component of school funding in rural areas where unemployment exceeds 20%.

Associated Oregon Loggers represents approximately 1,000 contract logging companies and businesses associated with the logging industry in the State of Oregon. Its members are primarily small, family-owned businesses, many of which are owned and managed by second, third, and even fourth

generations of loggers. Members rely on a long-established transportation system (including forest roads) to move logs and other forest products from the woods to processing mills and other destinations.

The Buckeye Conservancy is an organization of family farm, ranch, and forest landowners and resource managers in the North Coast Region of California. The Conservancy is dedicated to the promotion, communication, and implementation of those ideals and policies that support the ecologic and economic sustainability of natural resources and open space in family ownership.

The California Forestry Association is a nonprofit, nonpartisan organization dedicated to sustainable uses of renewable resources and responsible forestry. Association membership includes forest landowners, forestry professionals, loggers, manufacturers, wholesalers, and retailers who are engaged in the production and distribution of wood products. These members own 3.8 million of the 7.4 million acres of private timberland in California and are committed to protecting and enhancing the natural life cycle of California's forests. They also supply wood resources by contracting to purchase and harvest significant amounts of timber from public lands including the national forests.

The Forest Landowners Association was established in 1941 to provide its members with education, information, and national grassroots advocacy, which enables them to sustain their forest lands across generations. Association members own and operate more than 40 million acres of forest land in 48 states. Through outreach on behalf of private forest landowners nationwide the Association seeks to

enhance forest land management and stewardship. The Association also provides advice, support, and information to policy makers, educating them on how proposed legislation could affect private forest management, stewardship, and owners' rights.

The Kentucky Forest Industries Association was organized in 1965 to promote the economic welfare and interests of Kentucky's wood industry by advocating conservation and sustainable forest use, and by working with agencies to promote the forest industry. The Association has a wide range of members (approximately 600) including landowners, sawmills, loggers, flooring companies, insurance companies, financial institutions, forest/heavy equipment companies, and numerous other support industries. Association members directly employ over 20,000 people with a large impact on the state's economy.

The Mississippi Forestry Association was founded in 1938 to promote landowner rights, environmental stewardship, member prosperity, and community understanding through educational outreach and advocacy. The Association has approximately 3,000 members including landowners, foresters, forest industry companies, hunting clubs, and others. Forestry and forestry products are a $19.2 billion industry in the state.

The Missouri Forest Products Association was established in 1970 to encourage the wise use and conservation of the Nation's resources through education and issue advocacy. The Association has over 300 members, comprised primarily of wood processing mills and logging businesses. Association members contribute more than $4 billion directly to

the economy with between $10-$12 billion in induced benefits.

The North Carolina Forestry Association was organized in 1911. The Association actively promotes healthy, productive forests by supporting the efforts of forest landowners and forestry-related businesses that responsibly manage or use forests and produce wood and paper products. The Association is primarily engaged in legislative and regulatory advocacy, environmental education, logger training, and education and public outreach. The Association has approximately 4,000 members, including forest landowners, forest managers, wood suppliers and loggers, and producers of wood and paper products. Forest products is North Carolina's largest manufacturing industry providing over 68,000 jobs with an annual economic impact of $23 billion affecting more than 180,000 jobs. Forest lands in North Carolina cover more than 18 million acres (59% of the state).

The Northern Arizona Loggers Association was formed in 1975 to promote forest industry professionalism, knowledge, and safety, primarily through training and education. The Association has numerous members made up of logging contractors and suppliers. Most are family-owned businesses vital to local rural economies. The Association reports that Arizona is currently in the bidding process on a proposed 750,000 acre forest restoration project (the largest in the Nation) and that requiring Clean Water Act permits for the estimated 2,000 miles of related forest roads could undermine the project.

The Ohio Forestry Association was founded in 1903 and became a trade association in 2008. The

mission of the Association is to support the management of Ohio's forest resources and improvement of business conditions for the benefit of forestry-related industries and enterprises, including the hardwood industry, logging companies, sawmills, pulp and paper mills, hardwood brokers, equipment sellers, consulting companies, foresters, and landowners. To that end, the Association engages in policy and legislative advocacy, education, and outreach. The Association manages the Ohio Master Logging Company Certification Program which is an outgrowth of Ohio's response to dealing with silvicultural activities as nonpoint sources of pollution. The Association works closely with state and local agencies to deal with voluntary compliance mechanisms and all participants believe the current approach is addressing Ohio's needs. On every Ohio Environmental Protection Agency (EPA) water quality assessment of pollution sources, silviculture is rated as of little concern. A 2005 report by the Ohio Division of Forestry and Ohio State University showed that Ohio's wood and fiber industry contributed $15.1 billion to Ohio's economy and employed 119,000 people with a payroll of $4 billion.

Oregon Women in Timber was organized in 1979 to create awareness and appreciation for the value of trees, and to encourage an understanding about protection, management, and conservation of renewable forest resources. These goals are furthered through educational programs (like the Talk About Trees program) in schools that provide instruction on ecology, forest management practices, and the use of wood products. Members consist of women associated with loggers, foresters, school teachers, mill employees, consultants, landowners, and others who are concerned about forest management. Oregon Women in Timber

are active participants in Oregon Women for Agriculture and American Agri-Women.

The Southeastern Lumber Manufacturers Association is a trade organization established in 1962 to promote family-owned lumber businesses. The Association represents lumber manufacturers in 17 states, primarily in the South. With emphasis on government affairs, marketing and management, and operational issues, the Association offers programs to support independent lumber manufacturers.

The Texas Forestry Association was founded in 1914 to enhance and perpetuate Texas forest resources through tree planting, education, training, and political action. The Association has approximately 2,855 members which include private landowners, professional loggers, consulting foresters, and processing mills. In East Texas alone forest lands are 94% privately owned and cover more than 12 million acres. Forestry is a major state industry.

The Treated Wood Council was established in 2003 to serve all segments of the treated wood industry in government affairs. The current membership is approximately 474 and includes wood product suppliers, wood preservative suppliers, wood treaters, and related organizations throughout the country. Member businesses have a $4.5 billion impact on the national economy and supply approximately 15,000 direct jobs.

The Virginia Forest Products Association was founded in 1958 to support and advance Virginia's lumber and wood products industry through public education and legislative and regulatory advocacy. The association has more than 200 members, primarily

small businesses, and represents those who produce lumber and wood products in the Commonwealth of Virginia as well as those companies that provide goods and services to these producers. Association members produce the majority of the lumber and wood products manufactured in Virginia. Virginia's forest industry ranks as one of the commonwealth's largest manufacturing sectors. A recent study by the Weldon Cooper Center found that Virginia forests provide more than $27.5 billion in annual benefits.

Washington Contract Loggers Association, Inc., is a trade association that represents over 700 logging companies within Washington State. Association members either own forest land, log for small forest landowners, or purchase standing timber from private or public landowners. The use of forest roads is vital to the logging industry.

Amici believe the Ninth Circuit's interpretation of the Clean Water Act and EPA regulations is unfounded and will unnecessarily impose heavy regulatory burdens on thousands of forest land owners and operators across the nation. For the first time in the history of the Act, channeled rainwater runoff will be regulated as a point source pollutant displacing long-established state water quality programs and driving up the cost of wood products. As attested above, forestry is a major state and national industry which the Ninth Circuit decision will hamper. The high cost of complying with a new NPDES (National Pollutant Discharge Elimination System) permit program will undoubtedly limit the use of forest lands and the availability of forest resources and impair the livelihood of small, family-run operations; a mainstay

of the industry. Therefore, Amici urge this Court to grant review and overturn the decision below.

INTRODUCTION AND STATEMENT OF THE CASE

It may be easy to forget that court decisions affect real people. In this case, the effect of the Ninth Circuit decision below is severe and far-reaching. It overturns more than three decades of regulatory practices nationwide and undermines settled expectations. For the first time since the inception of the Clean Water Act, channeled rainwater from forest roads now will be regulated as an industrial discharge requiring an NPDES permit. This is not insignificant. There are literally hundreds of thousands of forest roads throughout the Country and the cost of obtaining, processing, and complying with an individual NPDES permit can be expected to run to tens of thousands of dollars and months of work. And, the costs of permitting would fall primarily on small, private landowners in rural areas where the economy is depressed and joblessness is high.

But this is not all. The immediate effect of the Ninth Circuit decision is to put the EPA, the states, and the entire forest industry in limbo, unsure of the legal status of current forest road operations. The long-term effect is equally uncertain as it is unclear if, when, and how the EPA and the states will respond to the decision. As noted by the Petitioners, the court decision was based on a unique interpretation of the Act and agency regulations in conflict with other Circuit Courts of Appeals, without the EPA ever appearing as a party litigant.

Moreover, none of this was necessary to protect water resources. Nationwide, rainwater runoff from forest lands and forest roads has been addressed for decades under the Clean Water Act as nonpoint source pollution, minimized through time-tested "Best Management Practices" (BMPs) at the state level, implemented in some states through state forest practices regulations, all with EPA oversight.[2] EPA, state agencies, and stakeholders have found this state-based system of BMPs to be efficacious. However, the Ninth Circuit tossed out that system in favor of a wholly unworkable and redundant point-by-point permit program.

For these and other reasons, Amici believe review is warranted and should be granted.

SUMMARY OF ARGUMENT

The Ninth Circuit held that channeled rainwater runoff from forest roads is subject to NPDES permitting under the Clean Water Act as a point source discharge. *See Nw. Envtl. Defense Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2010). That decision overturns more than 30 years of federal, state, and private forestry practice. In addition to the legal arguments raised by Petitioners, Amici believe there are equally compelling practical reasons for this Court to grant review.

Amici demonstrate below that the Ninth Circuit decision may require thousands, if not millions, of

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[2] *See* 33 U.S.C. § 1329 (nonpoint source management programs); http://www.epa.gov/owow_keep/NPS/cwact.html (last visited Oct. 2, 2011) (EPA nonpoint source program website); http://www.epa.gov/owow_keep/NPS/ forestry.html (last visited Oct. 14, 2010) (EPA website on nonpoint source BMP for forestry).

additional NPDES (Section 402) permits for forest landowners and loggers nationwide. Neither the states nor the EPA are equipped to handle the influx. The decision will engender an unprecedented number of permit applications that the agencies will be unable to process expeditiously, resulting in significant delays and costs for the regulated community.

A decision that has the potential to change an entire industry with potentially drastic effects on the economy and jobs warrants a look by this Court. Therefore, this Court should grant the petitions for writ of certiorari.

ARGUMENT

Court rules state that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The parties have identified compelling legal reasons for granting the petitions in this case; *i.e.*, to resolve a conflict among the Circuits and to address the Ninth Circuit's failure to apply the interpretive guidelines established by this Court in *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). However, Amici suggest some compelling practical reasons for granting the petitions.

I

THE PANEL DECISION WILL CREATE AN OVERWHELMING NUMBER OF PERMIT REQUESTS FOR MILLIONS OF MILES OF FOREST ROADS, LEADING TO TREMENDOUS AND BURDENSOME PERMITTING DELAYS

As an aid to this Court, Amici have compiled information reflecting the potential impacts of the decision below. This information establishes that the imposition of the NPDES (Section 402) permitting requirement for rainwater runoff from forest roads will produce unprecedented permitting costs and delays. Although this information is based on Amici's recent estimates, it is not unlike the data cited by the EPA in 1990 when it made a policy decision not to regulate rainwater runoff from forest roads as a point source under the Clean Water Act. *See* 40 C.F.R. § 122.26(b)(14); 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990).

A. The Ninth Circuit Decision Will Result in a Significant Increase in the Number of NPDES Permitting Applications

If the Ninth Circuit decision is not overturned and EPA is forced to develop a rainwater permitting program for forest roads, that program could be developed on a per-landowner or a per-harvest basis. Under either scenario, however, a permit would have to authorize and impose meaningful effluent limitations on each permitted discharge, which may turn on the number of pertinent forest road water

conveyances. *Cf.* 33 U.S.C. § 1311(e) ("Effluent limitations . . . shall be applied to *all* point sources of discharge of pollutants . . . .") (emphasis added). Therefore, to provide a full picture as to the likely impact of the Ninth Circuit decision, Amici provide the following information.

1. National Data

There are 423 million acres of private forest land in the United States, owned by about 11 million individuals and entities. The vast majority of these owners—92%—are individuals or unincorporated entities. They control 62% of all private forest land, amounting to 264 million acres. Of the 264 million acres of family forest land nationally, 58% of those acres are owned by individuals who commercially harvest trees from their property. W. Brad Smith, *et al.*, *Forest Resources of the United States, 2007*, at 20 (2009).[3]

Based on the foregoing, there are approximately 150 million acres of family-owned forest land in this country that are used principally for tree harvesting. Assuming that an average tree harvest on this land would encompass 200 acres, and assuming that each of these harvests would require access to forest roads having some form of channeled water conveyance (a point source), there are 750,000 potential tree harvest sites for which a rainwater permit may be necessary.

Alternatively, the data can be analyzed on a per-landowner basis. Based on the foregoing statistics, there are approximately 10.1 million family forest

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[3] *Available at* http://nrs.fs.fed.us/pubs/7334 (last visited Oct. 2, 2011).

landowners in the country. In a recent survey, these landowners were asked to rate, on a scale of 1 to 7, how well a list of uses described the actual use of their working family forest land. From the survey, 30% of the landowners rated timber harvesting as the main reason for owning their forest land (*i.e.*, rating it 1 or 2). *See* Brett J. Butler, *Family Forest Owners of the United States, 2006*, at 16 (U.S. Forest Serv. 2008).[4] Assuming that these landowners would likely use their land in the future for tree harvesting, and assuming that each of these tree harvests would require access to forest roads having some form of water conveyance, it follows that there are approximately 3,000,000 family forest landowners who may be required to obtain an NPDES permit, under the Ninth Circuit's decision.

Finally, the national data can be analyzed in terms of the number of potential rainwater conveyances for which specific effluent limitations may have to be established as part of the permitting process. Although Amici do not have data readily available on the number of such conveyances nationally, Amici believe that a fair estimate can be extrapolated from regional data. For example, as shown in greater detail below, in the State of California there are approximately six miles of forest road per square mile of private forest land. As discussed above, 58% of the nation's 264 million acres of family forest land are held as working forests. Assuming, much more conservatively, a ratio at the national level of one mile of forest road per square mile of working family forest land, there are approximately 264 million miles of forest roads on working family forest land. Also in

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[4] *Available at* http://nrs.fs.fed.us/pubs/gtr/gtr_nrs27.pdf (last visited Oct. 2, 2011).

California, there are on average 2.43 water conveyance structures per mile of forest road. Again assuming, much more conservatively, an average ratio at the national level of one water conveyance per mile of family forest road, the estimated total that may require an NPDES permit is 264,000,000.

2. State Data

Here, Amici provide forest road information for selected states, primarily in the Ninth Circuit, that supports the national data provided above.

a. Washington

The State of Washington has approximately 22.1 million acres of forest land. *See* Smith, *supra*, at 153. Private landowners control approximately 7.8 million acres. Although complete data is not available for all of these acres, data covering 7.3 million acres of Washington's large private- and state-held forest lands reveal that these areas contain approximately 57,000 miles of forest road.[5] Based on a conservative assumption that the ratio of ditches or culverts to mile of forest road is one to one, the estimated total possible water conveyances associated with these forest lands that are potentially subject to NPDES permitting is 57,000. That number may significantly understate the total permitting sites, however, for two reasons. First, the figure covers only 33% of the total acres of forest land within the state. Second, the forest road data on

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[5] These data are derived from the Washington State Department of Natural Resources' records for Road Maintenance and Abandonment Plans. Washington state law requires forest landowners to file these plans with the state agency. *See* Wash. Admin. Code §§ 222-24-050 to 222-24-0511. Importantly, this data covers only large private holdings and state-owned timberlands.

which the figure is based applies only to those forest roads crossing fish-bearing streams; there are, of course, many more forest roads within the state that cross nonfish-bearing streams that would still be subject to NPDES permitting under the Ninth Circuit decision.

b. Idaho

Idaho contains 21 million acres of forest land. *See* Smith, *supra*, at 152. As an example of the Ninth Circuit decision's impact on that state, Amicus Associated Logging Contractors-Idaho reports that 650,000 acres of forest land in Northern Idaho (a very small percentage of the total forest land in the state) contain approximately 6,000 miles of roads. Further, there are approximately four culverts for every mile of forest road on this land. Therefore, the estimated number of water conveyances that are potentially subject to NPDES permitting for this small sample of Idaho forest land is approximately 24,000.

The Idaho Department of Lands manages roughly one million acres of timberland, representing 7% of the state's total. The Department estimates the total mileage of logging roads to be 7,741 miles.[6] The Department does not have current data on the number of water conveyances on its land. Assuming conservatively that the ratio of water conveyances per mile of state forest road is two to one (compared to a ratio of four to one for the privately owned Idaho forest land), then the estimated sites subject to NPDES permitting is approximately 15,400.

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[6] This data comes from the Associated Logging Contractors-Idaho.

c. California

Of California's *nonindustrial* private forest land areas, there are 4.1 million acres of productive, unreserved forest, which equals approximately 6,400 square miles of forest. Based on informal Amicus California Forestry Association (CFA) survey data of its members, there are approximately 6.19 miles of forest road per square mile of forest.[7] Thus, CFA estimates that, on California nonindustrial private forest lands, there are approximately 44,400 total miles of private nonindustrial forest road. Also based on CFA's survey data, there are on average 2.43 water conveyances per mile. Hence, the estimated total NPDES permitting sites is 107,000.

Of California's *industrial* private forest land, there are approximately 4.4 million acres of productive, unreserved forest, which equals 6,878 square miles of forest. Based on the survey data discussed above, there are approximately 6.19 miles of forest road per square mile of forest (equaling approximately 42,600 total miles of private industrial forest road), also with an average of 2.43 water conveyance structures per mile. Therefore, the estimated NPDES permitting sites on private industrial forest roads is 103,000.

Based on United States Forest Service data for California,[8] CFA estimates that there are 9.8 million

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[7] The range is 4.9 to 7.4 miles of road per square mile of forest.

[8] Although Amici do not represent federal agencies, Amici do have members who use or maintain forest roads on federal lands and, thus, would likely be responsible for bearing the cost of obtaining NPDES rainwater permits. Moreover, the number of federal roads that would be subject to the decision is important to the interests

(continued...)

acres of productive unreserved forest within the state under the Service's jurisdiction, equivalent to 15,312 square miles of forest.[9] CFA also estimates that these lands are covered by 46,800 miles of forest roads, and that these roads, depending on their use, can have up to 20 water conveyances per mile.[10] CFA estimates that 45% of the Service's California forest road miles—approximately 21,000—have culverts or ditches. Assuming that, of those roads having culverts or ditches, there are approximately 20 of such structures per mile of forest road, then the estimated number of NPDES permitting sites is 420,000. However, the Service's data include "cross-drains" among water conveyance structures. Generally, such drains do not deliver rainwater to streams or rivers, and thus would not be covered by the Ninth Circuit decision. Assuming conservatively that half of the Service's water conveyance structures are nonpermittable cross-drains, then the estimated total water conveyances associated with Forest Service forest

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[8] (...continued)
of Amici: the more permit requests filed (whether by governmental or private actors), presumably the longer it will take for permits to be issued.

[9] Forest Service data were provided to CFA in part by personal communications from various Forest Service engineering personnel.

[10] The reason for the discrepancy between private timberlands and Forest Service land (2.43 to 20) is that, for private California timberland owners, the practice has been to use outslopes and rolling dips to *disperse* rainwater, rather than culverts and ditches to *collect* water. The former would not qualify as water conveyance structures subject to NPDES permitting because they would not be considered point sources.

roads that are potentially subject to NPDES permitting is 210,000.

d. Alabama

To demonstrate the impact of the decision outside of the west coast states, Amici provide the following data on the State of Alabama. According to Amicus Alabama Forestry Association, Alabama is comprised of 22.7 million acres of forest land (68% of the state's land area). Alabama has the third most forest land in the 48 contiguous states, behind only Georgia and Oregon. There are 22.7 million acres of forest land in the state with 82% or 29,084 square miles in nonindustrial family ownership. Based on the assumed national figure of one water conveyance per road and one road per mile, there are an estimated 30,000 potential permitting sites in the state on private lands alone.

3. Summary

Based on the foregoing data, Amici estimate that the Ninth Circuit decision would result in an unprecedented increase in NPDES permit applications. At the national level, Amici estimate the decision will create an additional 3,000,000 permit applications, based on the number of affected landowners, or 750,000 applications, based on the number of tree harvests, or 264,000,000 point source discharges requiring permits. This places an astronomical regulatory burden on both federal and state agencies that oversee or issue NPDES permits. The state data compiled by Amici supports the national numbers. In Washington, Amici estimate that the decision may create an additional 57,000 point source discharges requiring permits. In Idaho, Amici estimate an

additional 40,000 point source discharges requiring permits. In California, Amici estimate that the decision may create an additional 420,000 point source discharges requiring permits. And, further east, in Alabama, Amici estimate 30,000 permit sites on private lands alone.

B. The Panel's Decision Will Impose Significant Costs on Industry Because of the Magnitude of the New Permitting Obligation

As the preceding section makes clear, the magnitude of the permitting requirement placed on forest landowners, as well as on federal and state enforcement agencies, is huge and potentially unworkable. The Ninth Circuit itself recognized that fact when it offered its "sympath[y]" with EPA over the consequences of its ruling. *See Nw. Envtl. Def. Center v. Brown*, 640 F.3d at 1085. Further, the attached declaration, submitted by James A. Hanlon, Director of EPA's Office of Wastewater Management in connection with *The National Cotton Council of America v. United States Environmental Protection Agency*, 553 F.3d 927 (6th Cir. 2009) (Appendix A (App.)), confirms that imposition of an NPDES permitting obligation of the magnitude discussed above would overwhelm EPA and the states and make it nearly impossible for forest landowners to obtain needed permits in a timely manner. Director Hanlon explains that, currently, there are over 400,000 NPDES permits administered by EPA and the states. *See* Hanlon Decl. ¶ 11, App. A-7-A8. In California alone, the number of permittable rainwater conveyances would exceed that number. Nationally, the estimated number of permittable sites would exceed that number *by more than 600 fold*. The

cost and time required to obtain similar "dredged and fill" permits under the Clean Water Act is already intolerable. As this Court has observed, "The average applicant for an individual [CWA Section 404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion). If obtaining a Section 404 permit for the placement of dredged or fill material can take over two years and cost nearly $300,000, it does not require much imagination to envision a similarly costly and time-consuming process for obtaining a Section 402 NPDES discharge permit resulting from the Ninth Circuit decision.

A worthwhile comparison can be drawn from EPA's experience in issuing a general rainwater discharge permit for shipping vessels. That permitting program was also the direct result of litigation. *See Nw. Envtl. Advocates v. U.S. EPA*, No. C 03-05760 SI, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. Mar. 30, 2005). The decision required EPA to create a permitting program for approximately 70,000 new discharging sources.[11] EPA needed *over two years* to devise an adequate program. *See* Hanlon Decl. ¶¶ 7, 11, 38, App. A-5, A-7, A-27-A-28. But one hesitates to guess how much time the agency would need to produce a permitting program for *over 200 million potential discharging sources*. And while the agency struggles to produce a new permitting program, forest road owners and operators will be put in an impossible situation:

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[11] *See* http://cfpub.epa.gov/npdes/vessels/background.cfm (last visited Oct. 14, 2010).

Continue with business as usual and run the risk of becoming a defendant in a citizen suit, *see* Hanlon Decl. ¶ 8, App. A-6—precisely what has happened in this case—or cease using forest roads and abandoning their livelihoods.

CONCLUSION

It is impossible to predict the actual impact the decision below will have on landowners and wood producers, or federal and state agencies. But it is possible to predict that the decision below will drastically change forest road practices with far-reaching impacts on jobs and the economy. In light of the legal questions raised by Petitioners, these practical considerations provide compelling reasons for this Court to grant the petitions and determine the proper scope of the Clean Water Act. Amici urge this Court, therefore, to grant review.

Respectfully submitted,

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Director of EPA's Office of Wastewater
Management in connection with
The National Cotton Council of
America v. United States
Environmental Protection Agency,
553 F.3d 927 (6th Cir. 2009) A-1

IN THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, et al.,	)
Appellant,	) Nos. 06-4630; 07-3180/ 3181/3182/3183/3184/ 3185/3186/3187/3191/ 3236
v.	)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY	)
Appellee	)

DECLARATION OF JAMES A. HANLON

I, James A. Hanlon, declare that the following statements are true and correct to the best of my knowledge, information, and belief, and are based on my personal knowledge and information supplied to me by employees of the United States Environmental Protection Agency (EPA or Agency) under my supervision and information provided by my colleagues from EPA's Office of Pesticides Program (OPP).

INTRODUCTION

1. I am James A. Hanlon, Director of the Office of Wastewater Management in EPA's Office of Water. I have served as the Office Director since April of 2002. As the Director of the Office of Wastewater

Management (OWM), I direct the EPA office responsible for national program direction to the National Pollutant Discharge Elimination System (NPDES) permit program, including oversight of authorized State and Territorial NPDES programs. OWM has oversight responsibilities and provides technical assistance supporting EPA regional water programs. OWM also administers federal financial and technical assistance for publicly owned treatment works (e.g., municipal sewage collection systems and treatment plants). I supervise a staff of approximately 110 permanent full-time and part-time federal employees. OWM's annual program (operating) budget for fiscal year 2009 is approximately $28 million. OWM's operating budget also supports the management of State grants which total near $950 million.

2. Prior to my current position, I served as the Deputy Office Director of the Office of Science and Technology (OST) in EPA's Office of Water beginning in 1991. OST is responsible for the scientific and technical basis for federal water quality and safe drinking water programs, including establishment of national effluent limitations guidelines and analytical test methods. OST also provides scientific and technical support to other Offices with program implementation responsibilities within the Office of Water, including OWM, the Office of Wetlands, Oceans, and Watersheds, and the Office of Ground Water and Drinking Water. I have worked for EPA for more than 36 years. I received a Bachelor of Science degree in Civil Engineering from the University of Illinois and a Masters of Business Administration degree from the University of Chicago. I am a registered Professional Engineer in the State of Illinois.

3. I have read the Sixth Circuit Court of Appeal's Opinion of January 7, 2009, in National Cotton Council of America, et al., v. EPA. I understand that the Environmental and Industry Plaintiffs challenged EPA's Final Rule: Application of Pesticides to Waters of the United States in Compliance with FIFRA ("Final Rule") as codified at 40 C.F.R. 122.3(h), which excludes from NPDES permitting those pesticide applications consistent with FIFRA requirements that are applied to or over, including near, waters of the United States. As a remedy in this litigation, I understand that the Court has determined that the Final Rule should be vacated.

4. Since January 7, 2009, EPA has been analyzing the Court's decision and its impacts while also providing support to the states and communicating to sectors of the regulated community and environmental groups. I have heard first-hand the concern and confusion amongst the permitting authorities and pesticide applicators about who will be required to obtain a NPDES permit. EPA has determined that the Court's decision clearly impacts the following point source discharges to, over or near waters of the United States: discharges of chemical pesticides that leave a residual or excess and discharges of all biological pesticides. My staff has also worked with the OPP to clarify what pesticide use patterns will trigger a requirement to obtain an NPDES permit. At least the following large categories are covered when sprayed to, over, or near waters of the United States:

- Mosquito larvicides
- Mosquito adulticides

- Herbicides used to control weeds in lakes and ponds
- Herbicides used to control weeds in irrigation systems and other waterways
- Herbicides used to control weeds along ditch banks in agricultural drainage systems
- Insecticides used in wide-area insect suppression programs
- Herbicides used in wide-area control programs directed at aquatic invasive plant species
- Herbicides, insecticides and other pesticides used in forestry programs when applied over waters of the United States.

5. Using available information sources, OPP estimated the number of pesticide applicators and applications for the identified use patterns identified in paragraph 4. OPP estimates that these categories represent approximately 365,000 applicators and 5.6 million applications a year. OPP has also provided information to characterize the pest control needs which these pesticides address and the availability of other, nonpesticidal methods of controlling the target pests. Finally, OPP has provided information on the impacts of relying only on non-pesticidal methods of pest control. The information developed by OPP appears in Appendix A.

6. Because of the large number of similarly situated discharges, EPA intends to issue a general permit to cover pesticide discharges covered by the Decision. Individual permits are designed to address discrete discharges from fixed locations and would

require an individual public notice and comment period. In fact, I do not believe either EPA or states would be able to provide timely coverage to pesticide applicators using individual permits for nearly all of the types of pesticide applications covered by the Decision. Thus, as a practical matter, I believe that EPA and NPDES authorized states will not be able to provide applicators with a way to comply with the CWA's NPDES requirements without drafting a general permit for covered application of pesticides.

7. A vacatur will require EPA and authorized states and territories to immediately develop NPDES permits that comply with NPDES regulatory requirements found in 40 CFR Part 122 and described in more detail below. This process will take 2 years to ensure that all necessary NPDES permit requirements are met. This estimate is partly based on EPA's recent experience in issuing the NPDES general permit for vessel discharges, which took over 2 years to complete. Similarly, as discussed below, EPA is suggesting 24 months to develop a final NPDES pesticides general permit, including the time to work concurrently with authorized states and territories to draft and finalize their general permits simultaneously with EPA. When EPA issues an NPDES permit, it is only effective in non-authorized states (4), in territories, Indian Country, and on federal facilities. It is very important that the authorized permitting authorities keep in step with EPA to ensure national compliance with the CWA. A stay would provide EPA and NPDES authorized states and territories the time necessary to

develop, propose, and implement an NPDES permit that would satisfy the CWA requirements.[1]

8. Vacatur of the rule before a NPDES permit can be issued by the permitting authority would place pesticide applicators in a vulnerable position where they would be subject immediately to potential citizen suits for violating the CWA if they discharge pesticide pollutants to, over or near waters of the United States. Moreover, the intentional discharge of pollutants without a permit could technically subject an applicator to criminal liability under the CWA, however, EPA would not expect criminal charges to be brought during the time period prior to NPDES permitting authorities being able to make a permit available for pesticide applicators. Significant harm to public health could result if applicators choose not to apply pesticides in order to reduce the risk of liability. Some states have informed us that applicators in their states would not apply pesticides after the mandate in this case issues and prior to when a NPDES permit is available. A stay of the mandate until April 9, 2011 would prevent disruption to mosquito abatement programs, farming operations, forest management, irrigation districts, and other pemittees.

9. For the reasons set out in this Declaration, I believe that the immediate vacatur of the Final Rule would cause significant disruption to both EPA's and authorized states' NPDES permitting programs, as well as the regulated community and others including

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[1] EPA has authorized 46 States and 2 U.S. Virgin Islands to implement the NPDES program. Where, in this declaration I refer to authorized states, I am referring to the authorized states and the U.S. Virgin Islands.

federal agencies. First, I will provide a detailed description of the significant adverse effects arising from an immediate vacatur. Second, I will'explain the time intensive NPDES permit development process that gives rise to EPA's request that the Court stay the mandate until April 9, 2011 (24 months).

ANTICIPATED IMPACTS TO EPA AND NPDES AUTHORIZED STATES AND TERRITORIES IF THE MANDATE ISSUES BEFORE NPDES GENERAL PERMIT IS ISSUED

10. The mandate, if it issues prior to the availability of an NPDES permit, will effectively prohibit the discharge of almost all pesticides to, over or near waters of the United States. This would result in substantial disruption for both EPA and the 47 authorized NPDES permitting authorities. If the Court's vacatur were to take effect before EPA and authorized states and territories are able to issue NPDES general permits, significant numbers of pesticide applicators would immediately be faced with discharging without a permit. There are significant legal risks (third-party citizen suits) for any person determined to be discharging a pollutant into waters of the United States without a permit. Given these risks, I would predict that significant numbers of pesticide applicators would seek to obtain NPDES permits immediately upon issuance of the mandate, where the permitting authorities would not be prepared to respond.

11. NPDES authorized permitting authorities are concerned about whether they will have adequate resources to issue newly required permits that could potentially include hundreds of thousands of

applications in each state. The current universe of point sources requiring NPDES permits to discharge includes individual and general permittees. Nationally, approximately 45,700 facilities are authorized to discharge under individual permits. Another 120,000 facilities (including 70,000 vessels) are authorized under general permits for non-storm water discharges. Until the recent inclusion of the 70,000 vessel dischargers, in general, the universe of non-storm water permittees remained more or less stable since the inception of the NPDES Program in 1972. The 1987 CWA amendments established NPDES permit requirements for storm water discharges and the number of permits for stormwater discharges has increased significantly since then. EPA's 1990 and 1999 actions to promulgate the NPDES regulations for storm water substantially expanded the universe of point sources subject to NPDES permit requirements. Today, approximately 7,000 municipalities (approximately 1000 in 1990 and another 6000 in 1999) require NPDES permits for discharges from municipal separate storm sewers; 270 of these need individual permits. Approximately 96,500 industrial storm water point sources need permits. Approximately 250,000 point sources of storm water associated with construction activity require permits each year. Thus, the current total universe requiring NPDES permits (whether individual or general) is approximately 411,470 facilities. While most of the latter storm water discharges are authorized under general permits, more federal and state employees, resources, and expertise are now required to effectively manage the NPDES Program than ever before.

12. State governments have not matched the increased NPDES permitting work load with an increase in State environmental budgets. States have indicated that their environmental budgets have either been static or in decline for many years. In February 2003, the National Academy of Public Administrators confirmed an analysis by State environmental administrators demonstrating a budget shortfall of between seven hundred million to one billion dollars for implementation of State CWA programs. *Understanding What States Need to Protect Water Quality*, Report by a Panel of the National Academy of Public Administrators for the U.S. Environmental Protection Agency (2003). States generally have even fewer resources today. While the resources from the American Recovery and Reinvestment Act of 2009 will help fund needed infrastructure projects, additional funds under this Act are not available for NPDES activities. At the federal level, available resources for NPDES oversight activities have declined as well. In addition to increased numbers of point sources needing permits, other factors have increased pressure on NPDES permitting authorities including: (1) more complex legal challenges to entire programs and permits from the public, environmental groups, and industry; (2) increasing complexity of certain types of permits stemming from more sophisticated water quality-based regulatory requirements; (3) high employee attrition rates in NPDES permitting staff, particularly state employees; and (4) declining federal grant funding, in real terms, that has historically augmented the operating budgets of state permitting agencies.

13. In past efforts to bring new categories of point source discharges into the NPDES permitting

program, EPA has built in time to allow states to update their NPDES programs to address the new category prior to requiring permits for that category. EPA has spoken with the states and they anticipate needing at least 24 months in order to develop and implement a federally compliant program, with a longer time being needed if state statutes or regulations must be revised prior to permits being issued to pesticide applicators.[2] I acknowledge the need to issue and implement this general permit in an expedient manner. Under ideal conditions, EPA would build time onto the end of EPA's general permit process to enable states to model their general permits on EPA's. However, in order to expedite the process, here EPA plans on working concurrently with the states so they may simultaneously be working on their general permits.

ANTICIPATED IMPACTS TO PESTICIDE USERS IF THE MANDATE ISSUES BEFORE NPDES GENERAL PERMIT IS ISSUED

14. Pesticide users are concerned with what applications will be covered and how the upcoming spring spraying season will be affected. Pesticide users are extremely concerned that once the mandate is

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[2] EPA usually allows State programs one to two years to modify their programs, which includes EPA review and approval. This time is necessary for states to conform to changes in the Federal program. The timeframe typically depends on whether changes are required to State regulations or to statutes. See, e.g., 40 C.F.R. §123.62(e). Most states will not have to modify their regulations because they can issue NPDES permits for pesticide applications covered by the Decision under their current authorities.

effective, they will become immediately subject to the requirement to have an NPDES permit and without one, will be subject to enforcement, and/or liable for citizen suits. If a pesticide applicator is required to have an NPDES permit, but cannot obtain one because the permitting authority is unable to issue a timely permit, an applicator would face a difficult choice. If the applicator chooses to apply the pesticide, he would risk being in violation of the CWA which would expose him to penalties of up to $32,500 a day. Alternatively, an applicator could decide not to apply a pesticide. The impact of not using a pesticide would depend on many factors, including the type and extent of the pest problem, the nature of the harm caused by the pest, and whether non-pesticidal alternatives were available to address the pest problem. The Court's vacatur will potentially affect many types of pesticide applicators who are not accustomed to obtaining NPDES permits while also requiring permitting authorities to develop and issue NPDES permits for a class of dischargers that they have little experience permitting.

15. The sheer number of applicators requesting NPDES permits will be significant. Although EPA is still considering aspects of the Court's decision that will ultimately affect the scope of the general permit, the Decision will clearly require large numbers of pesticide applications to be covered under an NPDES general permit. At the very least, when the Court vacates the Final Rule, NPDES permits will be needed for each pesticide application that is applied directly to or over waters of the United States to control pests. Examples of such pests include mosquitoes, which transmit infectious diseases such as encephalitis and West Nile Virus, gypsy moths, which defoliate forests causing growth loss or the death of trees; algae and

weeds, which can clog irrigation canals reducing the amount of water available to irrigate crops; and invasive species such as zebra mussels, which attach to and block water intakes for municipal water supplies and hydroelectric plants. Information from OPP shows that as many as 365,000 applicators perform more than 5.6 million of these types of applications annually, and would hence need NPDES permit coverage.

ACTIVITIES PROJECTED TO BE IMPACTED BY A NPDES GENERAL PERMIT

16. To illustrate the magnitude, I have included the following information developed by OPP on the impacts of premature vacatur of the EPA Final Rule on mosquito control programs in the United States. According to OPP, there are approximately 1200 Mosquito Abatement Districts (MADs) and other agencies in the United States that apply mosquito control pesticides, and we estimate conservatively that each MAD employs at least one applicator. In addition, OPP's analysis of available information, including information from the National Agricultural Aviation Association, Florida Coordinating Council for Mosquito Control and EPA data, indicates that there are 99 million acre treatments with adulticides per year and 4 million acre treatments with larvicides. (An acre treatment represents a single application of a pesticide to an acre of land or water. Multiple applications to the same acre result in multiple acre treatments.) Based on information from these data sources on the distribution of aerial and ground applications made, and the number of acres treated per application by air and ground, there are approximately 461,000

applications with adulticides and 19,000 applications of larvicides per year. Together, the instances of adulticide applications, and the instances of larvicide applications yield the total estimate of 480,000 pesticide applications made annually by MADs and other agencies involved in mosquito control.

17. Programs to control mosquito populations are important for protecting public health. Although most types of mosquito-transmitted diseases have been eradicated from the United States, mosquitoes still carry some types of disease-causing organisms which they can transmit when they bite people or animals, notably including various forms of encephalitis, West Nile Virus, and dengue.[3] Disease carrying mosquito species are found throughout the U.S., especially in urban areas and coastal or in inland areas where flooding of low lands frequently occurs.

DEVELOPMENT OF A PROPOSED GENERAL PERMIT[4]

18. The development of a legally defensible general permit for covered pesticide discharges will be a complex process that requires in-depth analyses of technical issues, including the technology options used by pesticide applicators and the impact of their applications on water quality. NPDES permit requirements

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[3] A more in depth discussion of these types of diseases can be found at: Joint Statement on Mosquito Control in the United States from the U.S. Environmental Protection Agency (EPA) and the U.S. Centers for Disease Control and Prevention (CDC), at: http://www. epa.g ov/opp00001/health/mosquitoes/mosquitojoint. htm

[4] [No text in original]

can be found at 40 CFR Parts 122. The requirements for approved NPDES state programs can be found in 40 CFR Part 123. Permit procedures can be found in 40 CFR Part 124. These regulations apply to EPA and to EPA NPDES programs administered by 47 state authorities.

19. The process to develop a general permit takes time (40 CFR Part 122, Subpart C). The development of a NPDES permit for pesticide pollutant discharges will require in-depth environmental and technical analyses. The permitting authority must identify the types of pesticides and applications that need permit coverage, and develop permit conditions necessary to meet the CWA requirements. The permitting authority must give public notice of a draft permit, provide for public comment, and respond to those public comments prior to issuing the permit. In parallel to these efforts, EPA the Agency plans to work with the state permitting authorities to assist them in developing their NPDES general permits. In addition, it is imperative for EPA and authorized states to inform and educate the regulated community regarding the permit requirements and the process to obtain permit coverage before the Court's mandate issues. As explained in this declaration, EPA estimates this administrative process to develop, propose, issue, and implement general permits will take until April 9, 2011, or 24 months to complete.

20. EPA must adhere to the following critical steps described below in order to develop permit conditions and requirements that comply with the NPDES regulatory requirements. Most of these steps are necessarily sequential under EPA regulations governing the permitting process. However, EPA is

committed, where possible, to conduct tasks concurrently with other tasks to reduce the length of time it will take to complete the process. That process requires rigorous information gathering, collaboration with a variety of EPA experts, and careful technological and scientific analyses. The analyses will provide EPA with the critical information it needs to develop a technically sound general permit and meet the NPDES statutory and regulatory requirements found at 40 CFR Parts 122 and 125.

21. Identify information needs, collect and analyze data. The first step in the development of an NPDES general permit is to collect the data necessary for a preliminary understanding of the scope of the universe of sources that might be permitted, existing practices used by and controls on those sources, and the possible technology-based and water quality-based requirements that might be included in one or more NPDES permits for those sources. EPA has begun to collect a wide variety of information and will continue to do so as it develops permits for pesticide applicators. EPA will continue to engage in the following activities to collect and/or analyze the necessary information:

- Collection and review of information about pesticide labeling requirements and other aspects of the FIFRA program from EPA employees with expertise in pesticide regulations under FIFRA and by EPA employees with an expertise in the NPDES permit program under the CWA.
- Review existing data on the effects of the relevant pesticides on water quality.

- Review existing state permits and other authorities that regulate pesticides and the extent to which they meet federal requirements.
- Collect and analyze data on the number of pesticide applicators and applications.
- Collect and analyze data on existing state water quality standards for pesticides, waters designated as impaired by these pesticides and any total maximum daily loads for pesticides.
- Review pesticide use patterns and analyze the extent to which different permits or requirements would be appropriate.
- Analyze the extent to which existing pesticide labels require an integrated pest management approach to pesticide use, including consideration of the least toxic alternative.
- Review whether special permit requirements will be necessary to address inert ingredients and adjuvants.
- Review the types of application equipment and best management practices employed to minimize the impact of pesticides on water quality.

In my experience, the time it takes to develop and analyze such data can be lengthy and averages between 12 and 18 months, depending on the complexity of the universe to be permitted, in order to draft permit conditions and limitations (40 CFR Parts 123.43 and 123.44). In light of the urgency that would

be created by the Court's vacatur, I estimate that a minimally adequate effort to identify information needs, and collect and analyze data could be performed in 3 months.

22. EPA's Office of Pesticide Programs (OPP) has an extensive database on the toxicity, environmental fate, and other properties of pesticides. In addition, under FIFRA, which OPP administers, any person who produces a pesticide must report annually on the identity and amount of pesticide product produced. This information, together with data from USDA and private sources, give EPA a general understanding of the amounts of pesticide production and usage. Finally, OPP has additional information concerning equipment used to apply pesticides, methods of integrated pest management techniques, and other aspects of pesticide use that may be relevant to the development of a CWA general permit.

23. While OPP has collected a significant amount of data about pesticide usage and ingredients, it is critical for OWM to synthesize and analyze this data for CWA regulatory purposes because OPP data has been analyzed only under FIFRA.

24. Scope and define universe to be permitted. Because EPA will be developing a program for pesticide applicators who have never before had NPDES permits, it is EPA's experience that there will be "gray areas" that will require EPA to make decisions about whether some categories of pesticide applicators are or are not required to have an NPDES permit. EPA will need to clarify which applicators are eligible to be covered under the general permits developed by EPA. After analyzing the appropriate information and making preliminary decisions regarding the potential

requirements likely to be required of certain categories of pesticide applicators, EPA will need to decide whether it will be necessary to develop different permits for specific subcategories of pesticide applicators. This process will most likely take place concurrently with the data analysis process described above.

25. Develop draft permit and fact sheet. Prior to issuance of an NPDES permit, EPA or an approved state must develop a draft permit and fact sheet that explains the basis for the requirements and conditions in the draft permit. *See* 40 CFR 124.8(a). EPA must provide notice of these documents to the public and give the public an opportunity to comment on them. See 40 CFR Part 124.10. The development of these documents requires EPA to develop the permits' technology-based effluent limitations, any more stringent effluent limitations necessary to protect water quality, monitoring and reporting requirements and, standard and special conditions. These are discussed below. In my experience, in order to prepare a draft permit that will be developed sufficiently to allow for meaningful public comment and a legally defensible final permit, there must be several iterations of preliminary draft documents by the EPA workgroup, discussions with knowledgeable stakeholders and management review and decisions. I anticipate that this process will extend approximately 6 months beyond the initial data collection period.

26. Develop technology based effluent limitations. EPA will need to develop the technology-based permit limitations for the permit. The CWA requires that such permit limits reflect the "Best Available Technology Economically Achievable" (BAT). *See*

33 U.S.C.A §1311(b)(2)(A). Because there is no national effluent limitations guideline for pesticide applicators, EPA will need to develop technology based effluent limitations on a "best professional judgment" (BPJ) basis considering the same factors applicable to the development of an effluent guideline. 40 CFR 125.3(c) (2). This process will begin during our initial data analyses, depending on what data is received.

27. Develop water quality based effluent limitations, if and where necessary. An NPDES permit may not authorize a discharge that will cause or contribute to the violation of water quality standards. *See* 33 U.S.C.A. §1311(b)(1)(C). Because water quality standards are state specific, whether a discharge would violate water quality standards can vary from state to state. An NPDES permit must contain a water quality based permit limit if there is a reasonable potential for the discharge to cause or contribute to the exceedance of a water quality standard. *See* 40 CFR Part 122.44(d). For pesticide applications, such limitations might include limitations on the time of applications (e.g., fish spawning season) and limitations on where pesticides could be applied (e.g., not near drinking water intakes or in outstanding natural waters). EPA will need to review the water quality standards in each state for which it will be issuing a permit and determine whether additional limitations are needed to protect water quality. This exercise will take place concurrently with the critical steps described above.

28. Monitoring and reporting requirements. Permits must specify all monitoring and reporting that the permittee must perform. *See* 40 CFR 122.41(j). Such requirements vary depending on the nature of the effluent limitations in the permit. EPA will make

efforts to ensure that any such requirements provide information that is useful and does not duplicate reporting that is being required under other state or federal laws. EPA is required by the Paperwork Reduction Act to develop an Information Collection Request (ICR) that estimates the burden of collecting and reporting information required by EPA. 44 U.S.C 3501, et seq. The estimate must be based on estimates of the number of permittees and the average cost of the burden imposed on individual permittees. The ICR is made available for public comment along with the draft permit. EPA is required to consider the public comments, revise the ICR as appropriate, and then forward the ICR to Office of Information and Regulatory Affairs at the Office of Management and Budget (OIRA), which again provides public notice. The draft ICR process will be prepared while preparing the proposed general permit.

29. Standard conditions and special conditions. All permits contain standard conditions that are required by 40 CFR Parts 122.41 and 122.42 and which delineate the legal, administrative and procedural requirements of the permits. Because they are "standard", EPA does not expect to need significant time to develop these for the general permit. Special conditions, on the other hand, may take considerable time to develop. Special conditions are non-numeric limits that require the permittee to undertake activities designed to reduce the overall quantity of pollutants being discharged, or to reduce the potential for discharges of pollutants. As is described in the U.S. EPA Permit Writers Manual at page 137, special conditions may be used for "facilities discharging pollutants for which data are absent or limited such that derivations of technology or water quality-based

effluent limitations are difficult or impossible." Special conditions may contain preventative requirements such as best management practices. They also may impose additional monitoring requirements or special studies that provide the permit writer data to evaluate the need for changes in permit limitations. Because of the unique challenges of, and EPA's lack of experience with, developing NPDES permits for the pesticide applicators, EPA may need to expend considerable effort considering the need for and developing special conditions for the permit.

30. Public notice and public hearings. After EPA finishes drafting the proposed general permit, it is required to issue a public notice of the draft permit and to provide the public a minimum of 30 days to comment on the permit. 40 CFR 124.10. If a hearing is scheduled, the comment period is automatically extended until the close of the hearing. 40 CFR 124.12(c). A hearing is required whenever there is significant public interest expressed during the comment period. I anticipate such interest and therefore EPA will most likely hold a hearing. Based on this anticipated interest, I believe there would be a benefit to providing a longer comment period such as the 90 days that EPA often provides for significant actions. This would also allow EPA an opportunity to schedule public hearings during the comment period and for commenters to then be able to include information presented at those hearings in their comments. This process will begin immediately after the draft general permit is completed and ready for publication. I anticipate that this process will take 3 months.

31. Respond to comments and develop Administrative record. At the close of the comment period on the proposed general permit, the work group must review the comments to determine whether appropriate changes to the draft permit should be made.[5] Even if comments do not result in such changes, EPA must prepare a written response to all significant comments. The time it takes to respond to comments is dependent on the number of comments and the complexity of the issues that are raised. For example, in response to the Federal Register Notice for the draft NPDES general permits for discharges incidental to non-recreational vessels, EPA received over 1600 comments and more than 10,000 pages of government reports and publications, scientific papers, and other information. The response to comment document which responded to all significant comments regarding the Vessels General Permit was 1,273 pages long and took four months of intense effort to complete. I anticipate a similar or greater level of public interest in a general permit for covered pesticide applications, ultimately, requiring as much, if not more of a significant effort to respond to comments as was required for the Vessels General Permit. During this period, the

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[5] EPA intends to form a workgroup of co-regulators. The goal for this workgroup will be to provide EPA information on state pesticide permit programs, what works, what doesn't, and identify any state Agency barriers that could impede a state's timely issuance of Pesticides General Permits and/or processes that must be employed to remove these barriers. EPA will also confer with Association of American Pesticide Control Officials (AAPCO) and the State FIFRA Issues Research and Evaluation Group (SFIREG). AAPCO is an association that encourages uniformity among the states in their pesticide regulatory programs. Its members consist of state and federal pesticide regulatory officials.

Agency will also revise the permit fact sheet and other analyses in light of comments received. I estimate that EPA will ,require 8 months to respond to comments and develop and publish a final permit. During this time, EPA will simultaneously perform related activities that various statutes require before the permit is final and which are described below.

32. CWA § 401 Certification. Under CWA § 401, EPA may not issue an NPDES permit unless it has obtained a certification (or a waiver of certification) from States, Territories, and certain Tribes where discharges authorized under the permit occur, regarding whether an authorized discharge will comply with their water quality standards or other appropriate requirements of their law. EPA must send letters to the certifying jurisdictions requesting written determinations regarding certification under CWA § 401. EPA will notify the certifying jurisdictions that EPA may not issue a permit authorizing discharges into their waters until the certifying agency has granted certification under CWA § 401, or has waived its right to certify by not responding to the request for certification within 45 days from the date the draft permit was mailed to them. In addition, EPA will notify the certifying jurisdictions of the statutory and regulatory requirements applicable to CWA § 401 certifications, including the requirement that certifications must contain any specific conditions necessary to assure compliance with their water quality standards or other appropriate requirements of their law. 33 U.S.C. § 1341(d); 40 C.F.R. § 124.53(e)(1). States may publicly notice and solicit comment on their 401 certifications. This process will take a minimum of two months but will occur during the period when

EPA is developing the response to comments on the draft permit and preparing the final permit.

33 Coastal Zone Management Act. Similarly, EPA may not issue a general permit authorizing discharges into waters of a State until after determining whether its action is consistent to the maximum extent practicable with the enforceable policies of approved State coastal zone management programs under the Coastal Zone Management Act ("CZMA"). 15 C.F.R. 930.31(d) and 930.36(e). EPA consults on its consistency determination with the affected State(s). A State may respond to EPA with conditions to the general permit that allow the State to concur with EPA's consistency determination. If EPA does not incorporate the State coastal zone management agency's conditions into the general permit or if the State coastal zone management agency objects to the general permit, then the general permit is not available for use by potential general permit users in that State unless the applicant who wants to use the general permit provides the State agency with the applicant's consistency determination and the State agency concurs. 15 C.F.R. 930.31(d). The National Oceanic and Atmospheric Administration (NOAA), the federal agency that administers the CZMA, has explained that "a State objection to a consistency determination for the issuance of a general permit would alter the form of CZMA compliance required, transforming the general permit into a series of case by case CZMA decisions and requiring an individual who wants to use the general permit to submit an individual consistency certification to the State agency in compliance with 15 CFR part 930." 71 FR 788, 793. In any State that has not provided conditions for incorporation into the permit, as well as any State that

has not objected to the permit, EPA's CZMA compliance requirements derive from CZMA section 307(c)(1). Id. I expect that this process will occur simultaneously with the 401 certification process.

34. Endangered Species Act Consultation: Concurrent with the development of the proposed general permit, EPA will devote substantial resources to fulfilling its obligations under the Endangered Species Act (ESA), if EPA determines it is necessary. The ESA requires Federal agencies to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of their designated critical habitats. Pursuant to ESA § 7(a)(2) and its implementing regulations at 50 C.F.R. § 402.14(c), EPA will submit a request for consultation package to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service ("Services") regarding the issuance of the Pesticides General Permit, if EPA determines that consultation is indicated because of the nature of activities that may take place under a permit. EPA intends to develop a biological evaluation using the best available scientific and commercial data to analyze the potential effects of the proposed general permit upon listed species or critical habitat and a description of relevant listed species and their designated habitat. EPA will support the Services on their development of a biological opinion, if one is necessary. This will be a significant endeavor since the Pesticides General Permit will cover at least 500 active ingredients and as many as 900 inert ingredients. We estimate that it will take the entire length of the stay for the Endangered Species Act consultation, if it is determined to be necessary.

35. Issue final permit. The final general permit and supporting materials will reflect appropriate resolution of comments received and issues raised following the proposal. The final general permit will undergo an internal review process. A notice will be prepared that will be published in the Federal Register. This process will take place during the 8 month period identified above, which includes: response to comments, 401 certification, CZMA determination, preparation of the final Information Collection Request and OMB review of the Information Collection Request.

36. Implementation: EPA believes additional time is required after the final issuance of the general permit to make the regulated community aware of its terms and conditions. Given that most applicators will not have ever been subject to an NPDES permit, and depending on what the final permit requires, applicators will need time to bring their practices into conformance with the final permit. The general permit will specify whether or not some or all applicators must file a Notice of Intent prior to being covered by the general permit. Notices of Intent to be covered by a general permit often must be accompanied by documents that describe the permittee's best management practices or other plans that the permittee will implement. The permittee would need time to develop and submit such documents. Although I can not predict the extent to which the final general permit will impose requirements that will take time for applicators to be able to comply with, I estimate that 4 months would be a minimally reasonable ti me to educate applicators and allow them to come into compliance with the terms of a new general permit. Four months will also provide time to non-federal

authorized permitting authorities to issue and begin implementing their final general permits.

37. I am aware that twenty-three states have developed permits to cover some types of pesticide discharges. I am aware California issued its general permit on an emergency basis four months after the Headwaters decision to authorize certain short term and seasonal discharges of pesticide pollutants by public entities for resource or pest management. Additionally, the State of Washington issued its general permit 15 months after the Headwaters decision to authorize certain pesticide applications directed to aquatic plants. However, these permits cover only a specific subset of the universe of applicators and pesticides that will likely be covered by the general permit that EPA issues, such as pesticides for the control of weeds, algae, mosquitoes, nonindigenous fish, crustaceans and insects. Additionally, EPA must meet the rigorous statutory requirements outlined above. The estimated time that EPA is requesting the Court to consider reflects the additional time needed to develop, propose, and issue a general permit for all pesticide applications that are covered under the Opinion. My staff is evaluating the scope of these permits, their provisions, and requirements for maintaining and protecting water quality and compliance with the CWA. Thus, the time frames in which these two States issued their general permits do not represent the time needed by EPA and the States to issue permits in response to this Decision.

PAST EPA EXPERIENCE IN ISSUANCE OF VESSELS GENERAL PERMIT

38. As briefly discussed above, EPA recently issued the Vessels General Permit. That permit, which

also addressed a category of discharges that had previously been exempt, is a useful illustration of the general permitting process and the time necessary to draft a general permit. I believe a similar amount of time is necessary to develop, propose, and issue an NPDES general permit for point source discharges of pesticides. The Vessels General Permit was a result of litigation over a long-standing EPA regulation that excluded discharges incidental to the normal operation of a vessel from the need to obtain a NPDES permit. The Vessels General Permit covers discharges incidental to the normal operation of vessels. The Vessels General Permit took over two years to propose and finalize. I have no reason to believe that this process would be any faster or simpler for pesticide discharges subject to the Court's decision.

SUMMARY OF TIME REQUESTED TO STAY THE MANDATE

EPA estimates that it needs until April 9, 2011 before the rule is vacated to develop, propose, and take final action to issue an NPDES general permit that would be consistent with and satisfy the CWA requirements. In developing the NPDES General Permit for Pesticide Applications we will work closely with authorized states and will encourage them to develop their general permits concurrent with the development of EPA's draft general permit to expedite implementation.

CONCLUSION

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed on April 8, 2009

/s/ James A. Hanlon

Nos. 11-338, 11-347

IN THE SUPREME COURT OF THE UNITED STATES

DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

and

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF AMERICAN FOREST RESOURCE COUNCIL, PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, MONTANA WOOD PRODUCTS ASSOCIATION INC., ARKANSAS FORESTRY ASSOCIATION, FEDERAL FOREST RESOURCE COALITION INC., AND MINNESOTA FOREST INDUSTRIES, INC. IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae represent companies and families that depend, in part, on federal forests and rangeland for their livelihood.

American Forest Resource Council (AFRC) is an Oregon nonprofit corporation that represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC represents over 50 forest product businesses and forest landowners. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions regarding access to, and management of, forest lands.

In states where AFRC members are located, they purchase the majority of timber from federal lands managed by the U.S. Department of Agriculture, Forest Service and U.S. Department of Interior, Bureau of Land Management (BLM). AFRC members also enter into long-term stewardship contracts on the federal lands that include forest restoration projects such as repairing roads and replacing culverts. AFRC members also own land adjoining fed-

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[1] The parties' were given at least ten days notice of *amici*'s intention to file a brief. All the petitioners and respondent have filed a letter of blanket consent to filing amicus briefs and letters are lodged with the Clerk. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

eral land that can only be accessed by crossing roads on federal land subject to permits, easements, and right of way agreements.

The Public Lands Council (PLC), headquartered in Washington, D.C., represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC is a Colorado non-profit corporation. PLC membership consists of state and national cattle, sheep and grasslands associations. PLC works to maintain a stable business environment for public land ranchers in the West where roughly half the land is federally owned and many operations have, for generations, depended on public lands for forage.

PLC members hold longstanding permits to graze on federal allotments. Many of them also own water rights, the claim to which depends upon those ranchers' continued beneficial use of the water, primarily through livestock grazing. PLC members develop and maintain water sources and other improvements on their allotments and use roads across federal land to manage vested water rights. Grazing allotment access roads often are the same roads used to remove logs from federal land. PLC ranching families also own millions of acres of range and forest land, some of which is intermingled with federal land and, like AFRC members' properties, can only be reached by roads crossing federal land. The use of roads on federal land is critical to their ability to continue properly managing natural resources and producing food and fiber for the nation and world. The loss of the exempt status of the roads these ranchers use would burden them with new permitting costs, and it would incite litigation against the

land management agencies, taking time and resources away from the already-belabored grazing permitting process. Thus, not only will PLC members' access be threatened; the renewal of their permits could be in jeopardy, as well.

The National Cattlemen's Beef Association (NCBA) is the national trade association representing the entire cattle industry. NCBA is a Colorado nonprofit corporation. NCBA represents nearly 139,000 cattle producers and 45 affiliated state associations throughout the United States. NCBA's membership includes cow/calf producers, seed stock operators; commercial feedyard operations; and also processing facilities. NCBA works to advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests. As individual entrepreneurs, cattlemen raise livestock in more states than any other commodity, helping sustain a way of life in thousands of rural communities. Its members are proud of their tradition as stewards and conservators of America's land and waters, and good neighbors to their communities. Many of NCBA's western members own water rights, hold federal grazing permits or own range and forest land intermingled with federal land. NCBA members use the same public roads to move cattle between their private property and federal allotments that are used to remove logs. Without reliable and prompt access, NCBA's ability to retain their water rights, protect the resource and stay in business is jeopardized. Adding another layer of permitting and increasing the opportunity for environmental litigation will also cause hardship for federal lands ranchers.

The Montana Wood Products Association, Inc. (MWPA) is a Montana nonprofit corporation promoting healthy forests and healthy communities through management of Montana's forests. MWPA's membership includes companies and individuals involved in all facets of Montana's wood products industry. This includes sawmills, manufacturers of plywood, particle board, fiberboard, pulp and paper, posts and poles, log homes, as well as timberland owners and managers and logging contractors. They produce value-added products through manufacturing and provide over 7,500 direct jobs for Montana families. Since about 60 percent of Montana's forest land base is owned by the federal government much of which is intermingled with MWPA member's private timberland, road access to and through these lands is vital to maintaining healthy forests, producing timber, and protecting lands from wildfire.

The Arkansas Forestry Association (AFA) is an advocate for the sustainable use and sound stewardship of Arkansas's forest resources to benefit AFA members and all Arkansans, today and in the future. AFA is an Arkansas nonprofit corporation. AFA members manage private forestland to produce essential forest products, while maintaining fresh water and air supplies, and enhancing fish and wildlife habitat. AFA represents one of the state's largest manufacturing sectors, which directly employs about 33,000 people with a $1.46 billion annually in payroll. National forests are an important timber source for AFA members in western Arkansas and AFA supports continued access to these forests. AFA has a longstanding interest in ensuring that the use of forest roads on federal land is subject to

best management practices and not NPDES permits. AFA was an intervenor in a case on the Ozark National Forest where the Eighth Circuit ruled that logging and road building was covered by EPA's silvicultural exemption from NPDES permits. *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998).

The Federal Forest Resource Coalition, Inc. (FFRC) is a national coalition consisting of small and large companies and regional trade associations throughout the country whose members manufacture wood products, paper, and renewable energy from federal timber resources. FFRC is a District of Columbia non-profit corporation. Coalition members employ over 350,000 workers in over 650 mills, with payroll in excess of $19 billion. FFRC wants to ensure timely and effective access to federal lands to sustainably produce timber, pulpwood, and biomass and for prompt management to protect federal forests from insects, disease, and wildfire.

Minnesota Forest Industries, Inc. (MFI) represents forest products producers and landowners that are committed to conservation, quality forest management, and industry development that fosters sound environmental stewardship, multiple use of timberlands, and a dependable long-term timber supply. MFI is a Minnesota nonprofit corporation. Many of MFI's members purchase sawtimber and pulpwood from the Superior and Chippewa National Forests. MFI's members depend on timely access to these forests to complete timber sale contracts, particularly since access is limited during certain seasons. Disruption of access because of a time consum-

ing NPDES permit process would diminish an important supply of federal timber to our members.

Amici have an interest in this Court's review of the Ninth Circuit's decision that will effectively require federal land management agencies and private forest and rangeland owners to begin a lengthy and expensive process to obtain NPDES permits. Relying on Ninth Circuit Court of Appeals decision, environmental groups have already threatened to stop the use of roads on federal land under the Clean Water Act. U.S.C. §§ 1251 et seq. The NPDES permit requirements and associated litigation will significantly impede the ability of the Forest Service and the Bureau of Land Management to manage federal forests and rangeland, sell timber, issue grazing permits, repair roads, and restore forests and range to reduce the risk of wildfires. Wildfires on unhealthy federal forests and rangeland have burned onto *amici* members' private lands damaging forest and range resources including wildlife habitat and water quality. An onerous permitting process to keep roads open and maintained will increase the incentive for federal agencies to expand the obliteration and closure of roads and will discourage road maintenance. This will exacerbate the problem of federal, local, and private fire fighters being hindered by inadequate access in initial attack of fires during the critical first 24 hours after a fire starts and means fewer roads to use as a fuel break to control a fire. Thousands of acres have burned unnecessarily because of limited access.

PLC and NCBA (grazing *amici*) are deeply concerned with the prospect of having access to their members' grazing allotments prohibited or restricted

because of a requirement for NPDES permits for culverts and roads. Grazing *amici* are also concerned about access delays and restrictions impeding the development and maintenance of water improvements many of which support vested water rights. An expensive and lengthy permit process imposed on federal agencies to obtain NPDES permits will be detrimental to AFRC, MWPA, AFA, FFRC and MFI (timber *amici*) interests in obtaining timber from federal lands to run their mills. All *amici* have an interest in continued access to their members' private land using roads that cross intermingled federal land and the prospect of new avenues for environmental litigation against federal agencies further threatens *amici's* members' livelihoods.

SUMMARY OF THE ARGUMENT

This Court should grant the petitions for certiorari. The Ninth Circuit Court of Appeals failed to give deference to the Environmental Protection Agency's (EPA) long-standing interpretation that forest road construction, use, and maintenance from which there is natural runoff from rain does not require an NPDES permit under Section 402 of the Clean Water Act, 33 U.S.C. § 1342. By ignoring EPA's longstanding interpretation, the Ninth Circuit created a conflict with other circuits.

Rather than repeat petitioner's legal arguments in support of certiorari, *amici* want to emphasize that certiorari is also supported because of the exceptional importance of the Ninth Circuit's decision to the management of the vast acreage of federal forest and rangeland which supply timber and forage

for thousands of families and businesses in rural communities. *Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari"); *Andrus v. Utah*, 446 U.S. 500, 506 (1980). The effect of the Ninth Circuit decision extends beyond non-federal lands and logging activity which are at issue in this case. The decision also applies to millions of acres of federal land and to the roads used to access timber sales on national forests and public lands managed by the Bureau of Land Management. The decision also affects ranchers who use roads on federal land to access their federal grazing allotments and to maintain water rights, and to intermingled private landowners whose lands can only be accessed by roads across federal land.

Amici agree with EPA's long-standing interpretation that logging which occurs over several months on a site on 20 to 40 year intervals is not an industrial activity and that natural runoff is best controlled by non-point source best management practices. 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990). Logging on tracts of public land is even less frequent, often separated by intervals of 50 years or more. Nor is grazing an industrial activity when it occurs on a federal allotment where a pasture may be grazed for only a few weeks out of the year and the road used twice annually to bring livestock to and from federal pastures. Moreover, on millions of acres of federal land, the same road accesses both federal forest and pasture and an injunction or regulatory restrictions on hauling logs will harm ranchers who need to use the same roads to haul livestock.

ARGUMENT

Certiorari should be granted because the decision will broadly limit the federal land management agencies' ability to continue to sell timber, issue grazing permits, manage and authorize fencing and water source improvements, contract for road construction and restoration projects, and provide timely access to intermingled private lands that can only be reached across federal land.

A. This Case is of National Importance Because Resource Management of a Vast Area of Federal Forest and Range land is Likely to be Disrupted.

It is unclear whether timber purchasers, grazing permitees, road contractors, and stewardship contractors would be obligated to obtain NPDES permits and conduct the required monitoring or whether this would be the responsibility of the federal land management agency. Regardless of who is responsible for obtaining the permit and conducting the monitoring, it would be an extremely costly, time-consuming, and daunting task. Nationwide, the Forest Service has approximately 378,000 miles of roads under its jurisdiction covering 193 million acres. U.S. FOREST SERVICE, IMPLICATIONS OF DECISION IN NEDC V. BROWN TO SILVICULTURAL ACTIVITIES ON NATIONAL FOREST SYSTEM LAND, Doc. 1570-1, at 3 (Sept. 7, 2010). App. 1a. The Forest Service estimates that if it must obtain permits for roads under its control, it would have to obtain over 400,000 permits. The agency estimates it could take more than 10 years to complete the permitting process.

App. 6a. Even if the Forest Service can obtain programmatic permits by state, it estimates it would still take several years to obtain the necessary programmatic permits. *Id.*

Amici's concern that a vast acreage of federal lands will be drawn into this controversy is supported by actions of environmental groups. Three days after the Ninth Circuit filed its opinion, the Alliance for the Wild Rockies and the Selkirk Conservation Alliance filed a 60-day notice of intent to sue for violation of the Clean Water Act challenging the Lakeview-Reeder Fuels Reduction Project. App. 10a. The project involves road maintenance, road construction, and road storage and decommissioning to achieve long-term sediment reduction and watershed improvement on the Idaho Panhandle National Forest in Idaho. A complaint challenging the project was filed on October 6, 2010. *Alliance for the Wild Rockies v. McNair*, No. 2-CV-00504-EJL (D. Idaho) and the Forest Service subsequently withdrew the project and it has not been reoffered. Both the Forest Service and BLM have a large backlog of fish passage restoration work to replace road culverts that are blocked, poorly sized, or too far elevated above the stream. U.S. General Accounting Office, GAO-02-136, RESTORING FISH PASSAGE THROUGH CULVERTS ON FOREST SERVICE AND BLM LANDS IN OREGON AND WASHINGTON COULD TAKE DECADES (2001). An NPDES permit requirement to install replacement culverts will stall this fish habitat improvement work even further. Formal administrative protests have been filed to halt use of roads for projects involving log hauling and road rehabilitation work on BLM lands on the grounds that the projects need a Clean Water Act discharge permit.

See Administrative Protest of Evans Creek Project Decision Record and Finding of No Significant Impact as Implemented via the Skeleton Mountain Timber Sale, Klamath Siskiyou Wildlands Center, http://www.blm.gov/or/districts/medford/plans/evans/files/KSWildSkeletonProtest.pdf at 20.

Two projects in California have also been challenged on the grounds that the Forest Service has not obtained an NPDES permit for the silviculture, road use, and road restoration included in these projects. The first project is the Angora project in the Lake Tahoe Basin Management Unit that was prepared in response to the Angora fire within the Wildland Urban Interface (WUI) Defense Zone, which destroyed or damaged more than 250 structures on the South Shore of Lake Tahoe. *Environmental Assessment, Angora Fire Restoration Project,* USDA FOREST SERVICE (July 2010), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5181776.pdf. The Angora project includes removal of dead and dying trees, relocating roads outside of streamside zones, replacement of undersized culverts, and construction, decommissioning, and restoration of roads. *Id.* The second project is the Klamath National Forest travel management plan that will prohibit off-highway vehicle travel in some areas and permit off-highway vehicle travel on other roads. *Final Environmental Impact Statement; Motorized Travel Management Plan (formerly Motorized Route Designation), Klamath National Forest California and Oregon,* USDA FOREST SERVICE (January 2010), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5120060.pdf. Off-highway vehicles and federal roads are used by ranchers to administer their

federal grazing allotments, move livestock between pastures, and maintain fences and water sources. The administrative appeal argued that the Forest Service must obtain an NPDES permit which will delay much needed road restoration, culvert replacement, and forest health projects that lead to improved water quality.

B. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Struggling Forest Products Businesses that Rely on Federal Lands as a Source of Timber.

The extension of the Ninth Circuit's decision to federal forest land will adversely affect *amici's* members whether responsibility to obtain the NPDES permits and conduct monitoring lies with the federal agencies or *amici's* members who have contracts, permits, leases, easements, and right-of-way agreements with these agencies. In either case, the sale and removal of timber from federal land and the use of grazing allotments will be more costly and the approval process will be significantly delayed. Delaying federal timber sales now for several years through a costly NPDES permit process will threaten the operations of sawmills which are already struggling through the worst housing and lumber markets in this nation's history. *See generally, New Residential Construction,* U.S. CENSUS BUREAU, http://www.census.gov/const/www/newresconstindex.html; *Construction Statistics,* National Association of Homebuilders, http://www.nahb.org/reference_list.aspx?sectionID=130. In today's depressed markets private forest landowners tend to curtail the sale of their timber or export their logs. Timber sold from federal lands at

current market prices allows timber *amici* to be competitive in the depressed lumber market. *West Coast Log, Lumber Exports Soar in First Half of 2011,* Forest Business Network (September 3, 2011), http://www.forestbusinessnetwork.com/7170/west-coast-log-lumber-exports-soar-in-first-half-of-2011/. Furthermore, maintaining a steady supply of public timber at current market prices is crucial to help existing milling infrastructure survive which is also needed to help fight the forest health crisis on federal lands. Kramer, *Forest Service Says Lack of Sawmills Hurting Forests,* Wenatchee World, (April 12, 2011), http://www.wenatcheeworld.com/news/2011/apr/02/forest-service-says-lack-of-sawmills-is-hurting/. Delaying public timber sales now for several years by requiring a costly NPDES permit process for the use of logging roads will threaten the already tenuous operations of sawmills, and of road and stewardship contractors that provide scarce jobs to support the struggling economies of rural communities. In order for the installed milling capacity and the skilled woods workers who support it to survive to better times, it is vital that the timber supply from public lands not be further curtailed by an NPDES permit process. If this infrastructure is lost by further constraining the supply of timber, it is unlikely that the investment will ever again be made in this industry and the loss of jobs will become permanent. This will devastate already struggling rural communities.

C. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Ranching Families and Businesses that Often Use the Same Roads Used for Logging on Federal Land.

Ranching families and businesses face similar concerns regarding the Ninth Circuit decision as they depend on "logging" roads to access their grazing leases on federal land. Since federal regulations discourage construction of duplicate roads, separate road systems have not been created for each specific purpose. *See e.g.* 43 C.F.R 2812.0-6(a) ("the intermingled character of the O. and C. lands presents peculiar problems of management which require for their solution the cooperation between the Federal Government and the owners of intermingled lands, particularly with respect to timber roads . . . the duplication of an existing road reduces the value of the federal and other timber which is tapped by the existing road."). Federal roads are used by loggers and ranchers alike. If the use and maintenance of a "logging" road on federal land without an NPDES permit violates the Clean Water Act, then invariably the Forest Service or the BLM will preclude the use of the road for hauling logs, livestock, or other commercial products until the an NPDES permit is issued. If the agencies choose not to preclude use of a logging road pending completion of an NPDES permit, then environmental groups undoubtedly will seek a judicial order to preclude the use of the road more broadly. App. 10a.

D. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Intermingled Landowners who Require Access Across Federal Land.

Federal land is often intermingled with private land and the use of private land is dependent upon access across federal land. *See e.g.*, E. RICHARDSON, BLM'S BILLION – DOLLAR CHECKERBOARD, MANAGING THE O & C LANDS (1980). *Amici* who have inholdings and must access their forest or range land across roads on federal land face the prospect of being denied access while waiting for federal land management agencies to complete the NPDES permit process.

CONCLUSION

Because the Ninth Circuit's holding that NPDES permits are required for logging roads incorrectly applied the law, will extend to millions of acres of federal forestlands, rangelands, and intermingled private lands, will impose a new costly and time consuming permit process on federal land, and will increase the already abundant litigation over the management of federal land, *amici* respectfully urge the Court to grant the petition for writ of certiorari to review and reverse the decision to ensure that it is consistent with other intra-circuit precedents and affords the EPA the deference that it deserves.

Respectfully submitted,

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October, 2011

APPENDIX 1 — IMPLICATIONS OF DECISION IN *NEDC V. BROWN* TO SILVICULTURAL ACTIVITIES ON NATIONAL FOREST SYSTEM LAND, U.S. FOREST SERVICE, SEPT. 7, 2010

Forest Service
Washington Office
1400 Independence Avenue, SW
Washington, DC 20250

File Code: 1570-1 Date: September 17, 2010

Route To:

Subject: Implications of Decision in Northwest Environmental Defense Center v. Brown to Silvicultural Activities on National Forest System Land

To: Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs and WO Directors

On August 17, 2010, the United States Court of Appeals for the Ninth Circuit (9th Circuit), in *Northwest Environmental Defense Center v. Brown* (*NEDC*), 07-35266 (9th Circuit), ruled that it considers storm water runoff from logging roads to be a discharge of pollutants from a point source when collected by ditches, canals, and culverts and discharged into streams. As such, the 9th Circuit ruled that these discharges are subject to permitting requirements of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES). Environmental Protection Agency (EPA)

regulations at Title 40, Code of Federal Regulations, Section 122.27 (the "Silvicultural Rule,") exempted such discharges from the CWA's permitting requirements prior to this ruling. The Court held that the Silvicultural Rule violates CWA.

Although the Forest Service was not a party to *NEDC*, several questions have arisen about application of the decision to silvicultural activities on National Forest System land and its impacts on State, private, Tribal, and forest lands under other jurisdictions. The enclosed document, prepared by the Forest Service and the Office of General Counsel, addresses questions that field units have asked about *NEDC*.

Because the Forest Service was not a party, the Agency is not immediately impacted by the 9th Circuit decision in this case. At this time it is recommended that Forest Service personnel:

- Continue the use of best management practices, compliance monitoring, and update of National Best Management Practices Handbook and Monitoring Protocols.

- Work with EPA regional offices and States with delegated permitting authority to address permitting for logging road ditches and culverts.

- Continue to coordinate closely with EPA regarding best management practices.

Appendix 1

If you have further questions regarding *NEDC* and its impact on the Forest Service, please contact your regional Office of General Counsel.

/s/Richard J. Cook (for) Tony Tooke
TONY TOOKE
Director for Ecosystem Management Coordination

cc: Anne Zimmermann
Richard Sowa
Tom Peterson

Appendix 1

Q&As: 9th Circuit's August 17, 2010 decision in

Northwest Environmental Defense Center v. Brown

Date: September 7, 2010

Issue: The 9th Circuit ruled that it considers storm water runoff from logging roads collected by ditches and culverts and discharged into streams to be a discharge of pollutants from a point source subject to permitting requirements of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES). Environmental Protection Agency (EPA) regulations at Title 40, Code of Federal Regulations (CFR), Section 122.27 (the "Silvicultural Rule,") exempted such discharges from the CWA's permitting requirements. The court held this exemption violates CWA.

Q: Was the Federal Government a Party to this litigation?

A: No. Neither EPA nor the Forest Service (FS) was a party in this lawsuit. This case involved environmental groups, private timber operators, and Oregon state officials. The FS is not *immediately* bound by this ruling. However, it could have impacts on FS activities.

Q: Did the 9th Circuit issue a nationwide injunction?

A: No. The 9th Circuit did not issue a nationwide injunction of the regulations at 40 CFR §122.27, but remanded the case to the District Court for further proceedings. The

9th Circuit has not issued any injunction, final order, or mandate. It is unclear when the District Court of Oregon will act or how those further proceedings may impact the FS or private entities.

Q: How might this lawsuit impact FS operations?

A: The FS will likely need to obtain a permit for the discharge of storm water from logging roads, which is channeled through a system of culverts, pipelines, ditches, or other diversions. Although the decision in this particular lawsuit did not immediately bind the Agency, the FS has received its first notice of legal challenge to road construction and maintenance activities based on this decision and anticipates additional challenges within the 9th Circuit. States located within the jurisdiction of the 9th Circuit Court of Appeals include Arizona, California, Nevada, Oregon, Idaho, Washington, Montana, Alaska, and Hawaii.

Q: If the FS needs to obtain NPDES permits for its logging roads, how long will that take?

A: The FS is still evaluating the answer to this question. EPA has delegated NPDES permitting authority affecting National Forest System lands to the State governments of all but four States (ID, NM, Mass., and NH) and has retained it in most of the territories (including Puerto Rico). Each State has a different process and timeline in place for issuing permits. Some States may determine that a general permit for logging roads is appropriate, while others may determine that individual roads or timber

projects require road-specific or project-specific permits. The FS will have to work closely with EPA and the States to efficiently obtain permits where necessary.

If the FS is required to obtain programmatic permits by State, we may have to work with 46 States and the process could take several years. If the FS is required to obtain permits on a road by road basis, that would mean obtaining up to 400,000 permits. This would likely take more than 10 years. There would also be an ongoing workload to maintain and administer these permits.

States located within the jurisdiction of the 9th Circuit Court of Appeals should be prioritized for any permitting activity.

Q: If the FS must obtain NPDES permits for its logging roads, how much will it cost?

A: The FS is still evaluating the answer to this question. See answer above.

Q: How will this ruling impact private timberlands?

A: Timber companies and others conducting silvicultural operations on private timber lands will likely be impacted in a manner similar to the FS, in that under this ruling, they must obtain a NPDES permit for storm water runoff associated with silvicultural activities and logging roads discharged to waters of the United States through a system of culverts, ditches, and canals. There are

approximately 260 million acres of private woodlands across the United States. They are accessed by a road network that consists of Federal, State, county, and private roads. Interior roads accessing these acres are low-volume timber access roads similar to roads found within the Federal estate which access comparable forested lands. Similar challenges will exist with NPDES permitting on these lands when ditch and culvert templates are used for drainage and travel way stability. The FS currently has inventoried approximately 378,000 miles of roads under its jurisdiction of approximately 193 million acres. Although no comprehensive database of roads traversing private timber roads exists, it is reasonable to extrapolate that private owners will have a proportionate number of roads needed to access their timber. The specific issue before the 9th Circuit involved private entities and the State of Oregon, and the Court's ruling may eventually affect all entities involved in resource management, whether private, State, or Federal.

Q: Must the FS stop building logging roads to wait for permits from the States or EPA?

A: No. The ruling does not immediately apply to the FS. The Circuit Court remanded the case to the District Court of Oregon for further proceedings. The District Court's future opinions may be instructive as to when and how the ruling might take effect. The FS, in the interim, should coordinate closely with EPA to determine the most efficient way to move forward.

Appendix 1

Q: Does the 9th Circuit's ruling apply to new, existing, or reconstruction of logging roads?

A: The opinion does not distinguish between new, existing, or reconstruction of logging roads, but concluded that storm water runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which a NPDES permit is required. The lawsuit challenged private timber operators' failure to obtain a NPDES permit for existing logging roads.

Q: Have EPA or the States permitted discharge of storm water from logging roads before?

A: No. Prior to the Court's August 17, 2010, opinion, the Silvicultural Rule at 40 CFR §122.27 was in effect and no permit was required. The Silvicultural Rule was an exemption to the CWA's permitting requirements, and was based upon Best Management Practices that EPA and the FS had agreed upon, and which the FS already had in place.

Q: How will this Ruling change storm water management activities on the ground?

A: This ruling should not affect road management practices. The FS currently uses best management practices (BMPs) and will continue to implement them to minimize sediment delivery to streams.

Appendix 1

Q: Is there any chance that this decision could be overturned after further review by a higher-level court?

A: This is unknown, but unlikely at this time. This decision was decided by the 9th Circuit Court of Appeals. Additional review by either the 9th Circuit or the Supreme Court is very rarely granted, and the Federal Government has almost no ability to request further review of this decision because it was not a party to the litigation.

APPENDIX 2 — SIXTY DAY NOTICE OF INTENT TO SUE, AUG. 20, 2010

Law Office of Dana Johnson, PLLC

Danna M. Johnson, Attorney at Law

August 20, 2010

VIA CERTIFIED MAIL

Chief Tom Tidwell
USDA Forest Service
201 14th Street SW
Washington., DC 20250

Ranotta McNair, Forest Supervisor
Idaho Panhandle National Forest
3815 Schreiber Way
Coeur d'Alene, ID 83815

Secretary Tom Vilsack
U.S. Department of Agriculture
1400 Independence Ave,, SW
Washington, D.C. 20240

Secretary Ken Salazar
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

RE: Sixty-day Notice of Intent to File Suit for Violations of the Clean Water Act

Appendix 2

Dear Chief Tidwell, Supervisor McNair, Secretary Vilsack, and Secretary Salazar:

I am writing on behalf of Alliance for the Wild Rockies (AWR) and the Selkirk Conservation Alliance (SCA). AWR and SCA intend to file a citizen suit pursuant to Section 505(a) of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. Section 1365 (a). AWR and SCA hereby give notice, pursuant to Section 505 (b) of the CWA, 33 U.S.C. Section 1365 (b), that the USDA Forest Service has violated and continues to violate the conditions of the National Pollutant Discharge Elimination System (NPDES) as required by the CWA and its Implementing regulations.

On December 4, 2009, the Forest Supervisor of the Idaho Panhandle National Forests approved the implementation of the Lakeview-Reeder Roads Project, and on May 10, 2010, the Forest Supervisor of the Idaho Panhandle National Forests approved the implementation of the Lakeview-Reeder Fuels Reduction Project. AWR and SCA have reviewed public file documents available on the USDA Forest Service website for the Lakeview-Reeder HFRA Project and have identified reporting, monitoring, and compliance violations. If you have information that indicates the violations listed in this notice did not occur or are incorrectly stated, please immediately respond and specify to which violation that information applies. AWR and SCA intend to file suit at the end of the sixty (60) day notice period to enforce compliance against these violations as well as any additional violations that AWR and SCA may discover.

Appendix 2

AWR and SCA are non-profit organizations dedicated to the protection of natural resources in the Northwest. AWR and SCA members regularly use and enjoy the waterways in Idaho, which are impaired by the discharge of pollutants through stormwater runoff from logging roads. The Forest Service has an obligation under the CWA to regulate its stormwater discharges from these logging roads.

Violations of NPDES Permit Requirements for Point Source Discharge

Stormwater Runoff from Logging Roads

Road work is proposed throughout the Lakeview-Reeder Project area, including road maintenance, road construction, and road storage and decommissioning. Major watersheds in the Project area are Granite Creek, Reeder Creek, and Kalispell Creek. Each of the streams in the project area is listed by the State of Idaho as impaired and not fully supporting beneficial uses. Kalispell Creek and Reeder Creek both have approved Total Maximum daily Loads (TMDL) for sediment. The Project would increase sediment delivery to these at-risk streams, thereby reducing water quality and impairing beneficial uses.

Stormwater runoff from logging roads deposits large amounts of sediment into streams and rivers. Much of this sediment is created by logging trucks hauling timber over roads and grinding up surface gravel and dirt. This sediment is then channeled away from road areas by ditches and culverts and eventually discharged into

streams and rivers. The sediment adversely affects fish by disrupting eggs, decreasing oxygen levels, increasing stream temperature, and interfering with feeding.

This stormwater runoff, collection, and discharge is a point source discharge subject to the NPDES permit process under the CWA. Sections 301 (a) and 402 of the CWA prohibit the discharge of any pollutant from a point source into navigable waters of the United States without a NPDES permit. The USDA Forest Service has violated the CWA and its implementing regulations by not obtaining permits for stormwater runoff that flows from logging roads into systems of culverts, ditches, and channels and then into forest streams and rivers.

Conclusion

If the above described violations are not cured, AWR and SCA intend to file suit under the CWA after the mandated sixty (60) day notice period to protect Idaho water resources and the interests of the AWR and CWA users who regularly use them, The intent of this action is to require the USDA Forest Service to come into full compliance with CWA requirements, particularly the NPDES permit process. In filing this action, AWR and CWA Intends to seek Injunctive relief as well as costs, attorneys' fees and litigation expenses as authorized by 33 U.S.C. Section 3.365(d).

If you wish to discuss any aspect of this notice or to discuss settlement of this matter prior to commencement of suit, please contact us.

Appendix 2

Persons Giving Notice

The full names, addresses, and telephone numbers of the parties providing notice are:

Michael Garrity, Executive Director
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Mark Sprengel, Executive Director
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Nos. 11-338, 11-347

In The Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE STATES OF ARKANSAS, *ET AL.* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

For over three decades, federal and state agencies, courts and private parties have understood the Environmental Protection Agency's Silvicultural Rule – 40 C.F.R. § 122.27 – to exempt stormwater runoff from forest roads from the Rule's requirement of a National Pollutant Discharge Elimination System ("NPDES") Permit, regardless of whether that stormwater is collected via man-made ditches or culverts. While the amici curiae states agree that stormwater runoff should be managed to minimize the amount of sediment delivered to a state's waters during storm events, Congress recognized that such potential water pollution resulting from non-point source activities is best regulated at a local level. In that vein, 33 U.S.C. § 1329 requires states to develop management programs for non-point source pollution and report to EPA on the best management practices ("BMPs") that are being used to reduce water pollution from non-point sources, such as forest roads. *See generally* 33 U.S.C. § 1329. The amici curiae states have followed Congressional and EPA's directives, and have worked to ensure individuals and companies who conduct timber harvesting to implement BMPs for forest road construction and maintenance in order to protect water quality and wildlife. The Ninth Circuit's decision effectively invalidates EPA's Silvicultural Rule

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[1] In accordance with Rule 37.2 the State of Arkansas provided notice to all counsel of record for all parties on October 3, 2011, which is more than 10 days before filing.

by determining that stormwater runoff collected in ditches and culverts is a point source of pollution, rather than a non-point source of pollution. Compounding the problem, the Ninth Circuit further ruled that timber harvesting constitutes an "industrial activity" under Phase I of the EPA's stormwater permit program, and the roads that are a necessary component of timber harvests requires National Pollution Discharge Elimination ("NPDES") permits. Because this decision fundamentally impacts existing state programs, amici urge this Court to grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Congress enacted the Clean Water Act ("CWA") in 1972. The CWA provided EPA with the authority to implement a consistent program throughout the U.S. designed to protect the waters of the nation from pollution. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (CWA's objective was "authorizing EPA to create and manage a uniform system of interstate water pollution regulation."). Prior to the enactment of the CWA, protection of the waters was handled by individual states. *See* S. Rep. No. 92-414, 1-11 (1971).

The CWA's cornerstone is a permitting requirement for "point source" discharges, *i.e.*, discharges of pollutants through "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete

fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft * * * ." 33 U.S.C. § 1362(14). This permitting program is the National Pollutant Discharge Elimination System (NPDES) permitting program.

EPA promulgated rules to implement the NPDES permitting program, including rules clarifying when permits were and were not required. One of these rules is known as the Silvicultural Rule. The Silvicultural Rule states:

> (a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.
>
> (b) *Definitions.*
>
> (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include non-point source silvicultural activities* such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, *surface drainage, or road construction and maintenance from which there is natural runoff.* However, some of these activities (such as stream crossing for roads) may involve point source discharges

> of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233) (emphasis added).

40 C.F.R. § 122.27. EPA has consistently maintained that, pursuant to this rule, "ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 [point source] permit program" 41 Fed. Reg. 6,282 (Feb. 12, 1976). State agencies charged with implementing the CWA have followed EPA's lead, and the clear language of the Silvicultural Rule, and have managed runoff from timber harvest roads as non-point sources of pollution. This Court should grant certiorari because EPA's longstanding position that timber harvest roads are a source of non-point source pollution is correct and consistent with the mandates of the CWA, should be given deference, and should not have been overturned by the Ninth Circuit.

2. Congress recognized that runoff from timber harvesting operations and forest roads, if improperly managed, can result in a significant degradation of water quality. Congress also recognized that management of non-point source activities is best handled by state and local government. To address the issue of non-point source runoff, Congress enacted 33 U.S.C. § 1329. This law requires amici states to develop best management practices and programs for non-point source pollution, report to EPA the BMPs that are being utilized within a state to reduce, and in some instances eliminate, water pollution from non-point

sources. *See*, 33 U.S.C. § 1329. Amici states urge this Court to grant certiorari because the Ninth Circuit's decision effectively rescinds the authority granted to the states by Congress' passage of 33 U.S.C. § 1329, and rescinds the best management programs adopted and tailored by each individual state in favor of the CWA's NPDES permit program.

3. EPA's approach that channeled precipitation from forest management and timber harvesting roads should be managed as a non-point source of pollution has been consistently upheld by other courts. This Court should grant certiorari because the Ninth Circuit is at odds with the decisions of other circuits and threatens the consistent interpretation upon which EPA, the states, and the forest industry have relied since the inception of the CWA.

ARGUMENT

A. The Ninth Circuit Failed To Defer To EPA's Reasonable Interpretation Of The Clean Water Act

1. The Silvicultural Rule

The Ninth Circuit's refusal to defer to the EPA's Silvicultural Rule violates what is commonly known as the *Chevron* deference rule. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the agency must effectuate Congress' express intent. *Id.* at 842. *See United States*

v. Mead Corp., 533 U.S. 218, 226-227 (2001). And if a statute is "silent or ambiguous with respect to the specific issue," a court should defer to the agency's interpretation if that interpretation is reasonable. *Chevron*, 467 U.S. at 843. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997). In this instance, Congress *has* spoken to the issue of channeled runoff from forest roads – and EPA's Silvicultural Rule implements that congressional intent. At the very least, EPA's rule is a reasonable interpretation of the CWA.

In the CWA Congress defined the term "point source" to exclude "agricultural stormwater discharges." CWA § 502(14), 33 U.S.C. § 1362(14). Silviculture, the growing and harvesting of trees, is an agricultural practice. John Gifford, *Practical Forestry* 12 (1907). Consistent with the fact that silviculture is an agricultural practice Congress has directed EPA to develop BMPs to control "to the extent feasible" the "agriculturally and silviculturally related nonpoint sources of pollution." 33 U.S.C. § 1288(b)(2)(F). Despite this clear legislative directive, the Ninth Circuit overturned Congress' intent by holding that timber harvesting is an "industrial activity." *See* slip Pet. App. 42a.[2]

The Ninth Circuit's error in ignoring the CWA's exemption that applies to agricultural stormwater discharges was magnified when it analyzed the two

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[2] Cited to Petitioner, Georgia-Pacific West, Inc. *et al.* Appendix.

rules at issue in this case – EPA's 1976 Silvicultural Rule and EPA's Phase I 1990 stormwater regulations. If there was any debate or ambiguity regarding whether precipitation from forestry roads, whether channeled or not, constitutes a non-point source of pollution, or whether timber harvesting is an industrial activity under the CWA, it was removed by the promulgation of the Silvicultural Rule and EPA's Phase I stormwater regulations.

EPA's Silvicultural Rule clearly and unambiguously defines "surface drainage, or road construction and maintenance" as a "non-point source" of pollution. 40 C.F.R. § 122.27. EPA has repeatedly explained the basis for its interpretation that forest road construction and maintenance constitutes a non-point source of pollution. Contemporaneous with the promulgation of the Silvicultural Rule, EPA stated that runoff from forestry road construction and maintenance is from "natural processes, including precipitation," and these natural processes are "better controlled" through the use of best management practices. 41 Fed. Reg. 24,710 (June 18, 1976). EPA stated that ditches, pipes and drains that serve only to channel, direct and convey non-point source runoff from precipitation are "not meant to be subject" to the NPDES program. 41 Fed. Reg. 6,282 (Feb. 12, 1976). Finally, EPA contemporaneously opined with the promulgation of the Silvicultural Rule in 1976 that stormwater runoff from forestry road construction and maintenance has more of the characteristics "of nonpoint source pollution." 41 Fed. Reg. 24,711 (June 18, 1976).

In order to cast aside EPA's analysis that channeled runoff from forestry road construction and maintenance is a non-point source of pollution, the Ninth Circuit relied on its decision in *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002). However, a close reading of the *Forsgren* decision reveals that it actually supports the long-standing interpretation of the Silviculture Rule from which the Ninth Circuit now departs. The issue in *Forsgren* was whether spraying insecticide from an aircraft constituted point source pollution or non-point source pollution. The United States Forest Service maintained that aerial spraying was a non-point source of pollution, and relied on the Silvicultural Rule and informal correspondence and guidance from EPA to buttress this position. The Ninth Circuit concluded that the Silvicultural Rule excluded the non-point source activities listed in the rule when natural runoff was present, "whereas the spraying involved here is not a non-point source activity at all." 309 F.3d at 1186. The Ninth Circuit then reviewed the two one-paragraph letters written by EPA, and a brief passage in an EPA guidance document that the Forest Service maintained indicated EPA's intent that an NPDES permit was not required for aerial spraying. According to the Ninth Circuit, "these post hoc informal documents provide no rebuttal to the contemporaneous explanation of the regulation published through notice and comment rule making in the Federal Register." *Id.* at 1190.

Unlike informal EPA letters and a guidance document, which were rejected by the Ninth Circuit as

unpersuasive in *Forsgren*, in this case the Ninth Circuit *had* contemporaneous EPA explanations concurrent with the passage of the 1976 Silvicultural Rule and published in the Federal Register. These contemporaneous explanations, as detailed in the amicus brief filed by EPA in this case below, demonstrate that EPA's position was – and always has been – stormwater runoff from channeled forestry road construction and maintenance is a non-point source of pollution. Nonetheless, the Ninth Circuit gave no credence, nor deference, to EPA's explanations published in the Federal Register during the passage of 40 C.F.R. § 122.27. In doing so, the Ninth Circuit's decision also runs afoul of the second step of this Court's *Chevron* analysis. Completely rejecting EPA's reasoned and contemporaneous explanations that forestry road construction and maintenance is a non-point source of pollution, the Ninth Circuit impermissibly rewrote EPA's Silvicultural Rule by espousing a completely new test, unsupported by any legislative intent or regulatory interpretation and unrecognized by any court. According to the Ninth Circuit, with respect to forest roads, the Silvicultural Rule's definition of a non-point source of pollution is limited to solely non-channeled, 'natural runoff.' *See* Pet. App. 32a. The Ninth Circuit's flawed interpretation of the Silvicultural Rule directly conflicts with EPA's contemporaneously stated view published in the Federal Register, and effectively nullifies the Silvicultural Rule in violation of *Chevron*.

2. The 1987 Stormwater Amendments

In 1987, Congress amended 33 U.S.C. § 1342(p) to address the problems associated with stormwater discharges. Congress directed EPA to require permits for five categories of stormwater discharges in Phase I of the program, including those stormwater discharges associated with "industrial activity." *See* 33 U.S.C. § 1342(p)(1)-(3). EPA promulgated its Phase I regulations in 1990, and defined discharges associated with industrial activity to include only those discharges directly related to manufacturing, processing or raw materials storage areas "at an industrial plant." *See* 55 Fed. Reg. at 48,011 (November 16, 1990). Forestry roads, even if channeled, cannot reasonably be considered industrial plants.

When it promulgated its Phase I regulations, EPA referenced Standard Industrial Classification ("SIC") 24. This regulation provides that facilities classified as SIC 24 are among those "considered to be engaging in industrial activity". *See* 40 C.F.R. § 122.26(b)(14)(ii). EPA explained in the Federal Register that the reference to SIC 24 in the Phase I rule was *not* intended to classify silvicultural practices and forestry roads as industrial sources. *See* 55 Fed. Reg. at 48,088 (November 16, 1990) (explaining that establishments under SIC code 24 "are engaged in operating sawmills, planning mills and other mills in producing lumber"). Despite the numerous contemporaneous explanations of EPA in the Federal Register that its reference to SIC 24 was not intended to include silvicultural activities and precipitation runoff

from forestry roads, and that timber harvesting and forestry roads were not intended to be included within the definition of "industrial," the Ninth Circuit reached a conclusion directly in conflict with EPA and ruled that forestry roads used to transport timber are "industrial" roads, and the transport of timber on forestry roads is an industrial activity. *See* 55 Fed. Reg. at 48,008-48,011 (November 16, 1990); *See* Pet. App. 35a-42a.

EPA's reasoned and logical assessment that surface drainage from forestry road construction and maintenance constitute non-point sources of pollution and that silviculture is not an industrial activity has not wavered for the last thirty-five years, despite the fact that Congress has amended the CWA a number of times since it original passage in 1972. This Court has stated repeatedly that when "Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 846 (1986).

The Ninth Circuit's defiance of *Chevron* warrants this Court's review.

B. The Ninth Circuit's Decision Raises An Issue Of Exceptional Importance Warranting Review Because Of The Impact It Will Have On Existing State BMP Programs

Forestry activities generally involve numerous small operations occurring sporadically over large amounts of space and long periods of time. Complicating the situation is the fact that different forests, even those in close proximity with one another, may have very different characteristics in terms of topography, tree species, soil types, wildlife habitat, geology and hydrology. In order to be effective, the approach to protecting the environment from forestry activities must be adapted to local conditions and circumstances. Congress recognized the fact that non-point pollution is unique to each state when it added section 319 to the CWA in 1987. *See* 33 U.S.C. § 1329. Section 319 required states to develop plans for any non-point source activities that are causing a state's water to fall short of the state's respective water quality goals. See 33 U.S.C. § 1329. Together, sections 218 and 319 authorize the states to obtain federal funding to manage non-point source pollution, with oversight from EPA. 33 U.S.C. §§ 1298 & 1329.

Forestry practices in the United States are now conducted under the most comprehensive program of BMPs of any land use activity in the nation. Some

amici states employ mandatory[3] BMPs administered by state foresters or forest practice boards or commissions. National Council for Air and Stream Improvement, Inc., *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Technical Bulletin No. 966 (2009). Other amici states employ non-regulatory BMPs[4] that are developed or approved by state agencies, with landowner education to encourage compliance, and authority for agencies to take action against landowners who do not comply. *See, e.g.*, Florida Division of Agriculture and Consumer Services, *Silvicultural Best Management Practices* (2008). BMPs vary among amici states for good reason. A BMP that is appropriate for a coastal pine forest in Georgia may be wholly inadequate for a temperate rainforest in Oregon, or an Ozark mountain forest in Arkansas. But while individual BMPs may vary, the single goal of protecting the waters of the nation is served in consistent fashion. Indeed, in order to advance the laudatory goals of the CWA, the BMPs must, of necessity, be designed in response to local conditions.

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[3] These sign-on states have mandatory BMP programs: Alaska Code 41.17.055(d) and the implementing regulation is 11 AAC 95.295; Idaho Code §§ 38-1301 *et seq.*; Kentucky KRS 149.344; New Hampshire.

[4] These sign-on states have non-regulatory BMP programs: Arkansas, Alabama, Florida, Georgia, Maine, Michigan, South Carolina, Tennessee, Virginia, Wyoming.

In spite of their variations, amici states' BMPs share a number of attributes because each state's BMPs are based upon a common set of science-based principles. National Council for Air and Stream Improvement, Inc. *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Technical Bulletin No. 966 (2009). BMPs will generally be designed to 1) minimize soil compaction; 2) separate exposed soils from surface waters; 3) separate fertilizer and herbicide application from surface waters; 4) inhibit hydraulic connections between bare ground and surface waters; 5) provide forested buffers around watercourses; and 6) properly plan, locate, and design roads to have a minimal impact on soil erosion and water quality. R. Olszewski & C.R. Jackson, *Best Management Practices and Water Quality*, National Council for Air and Stream Improvement, Inc. (2006).

Regardless of each state's chosen approach, BMPs and non-point source pollution prevention programs implemented by amici states are subject to EPA oversight and approval. *See* 33 U.S.C. § 1329. States whose water quality inventories fail to demonstrate continued improvement over time are subject to closer scrutiny and review by EPA, and poor performance can result in grant funding reductions. In short, BMPs have become an accepted, well-understood, documented, approved and successful method of protecting water quality in the United States, and in particular, in the nation's forests.

There are hundreds of millions of privately and publicly owned acres of forest land in the United States, with millions of miles of forest roads having some form of water conveyance, or channeling, associated with them that are currently managed by amici states BMP programs. A timber harvest does not occur overnight. Each site designated for timber harvesting and reforestation is the culmination of several years of multiple resource assessment and detailed project planning. Over the last three decades each amici state has expended thousands of hours and millions of dollars developing and implementing their respective BMP programs. The states' BMP programs have been developed by certified silviculturists, and these individuals meet certain standards of professional knowledge, skills and experience in multiple-use silviculture activities. In order to meet EPA standards, amici states provide training and certification in soils and watershed management, and while these individual BMP specialists are knowledgeable regarding the practices and procedures necessary to comply with sections 218 and 319 of the CWA, they are completely unfamiliar with the requirements of the CWA's NPDES program. If the Ninth Circuit decision in this case is not reviewed by this Court, the states established BMP programs will be jettisoned in favor of NPDES permits. These BMP professionals will likely be forced to learn a new discipline in order to comply with NPDES permit requirements.

Moreover, if the Ninth Circuit decision is not addressed by this Court, a blizzard of NPDES permit

applications will, out of necessity, be filed. Amici states are justifiably alarmed regarding the resulting tumult at the state level if hundreds of thousands of applications for new NPDES permits related to forest roads are filed within a short time frame. Furthermore, the Ninth Circuit's decision that channeled forestry roads require NPDES permits could not have come at a more inopportune time. While amici states are being tasked with an ever growing list of EPA initiatives, the supporting flow of federal and state dollars to keep up with these new government initiatives continues to diminish. *EPA FY 2012 Budget Hearing Before the Senate Interior, Environment and Related Agencies Subcommittee*, 112th Cong. (2011). Amici states have legitimate concerns about the overwhelming number of regulations they are facing from new EPA initiatives that are far outstripping the financial support received from EPA for implementation.

Forestry BMPs have been highly successful in controlling non-point source pollution from forest operations and roads for decades. National Water Quality inventories conducted by EPA demonstrate that stormwater runoff associated with urban areas, storm sewer discharges, and pollutants deposited from the atmosphere are more significant contributors of non-point source pollution than forestry activities and forestry roads. United States Environmental Protection Agency, *National Management Measures to Control Nonpoint Source Pollution from Forestry*, Pub. No. EPA-841-B-05-001, at page 1-1 (April 2005).

The Ninth Circuit's decision is tantamount to yet another unfunded mandate, by replacing amici states' long-standing and effective BMP programs with more complex and regulatory resource-intensive NPDES permits. Eventually, no state will be able to meet all of these new mandates when federal and state budgets are consistently reduced year after year, and the number of new EPA rules and programs to be implemented continues to increase year after year. Amici states, EPA, state agencies, and the forestry community have found the state-based system of BMPs to be workable and effective. Amici states, forest landowners small and large, and the forestry professional on the ground have over three decades of effort invested in the BMP programs. By discarding EPA's long-standing construction of the CWA and Silvicultural Rule that forestry roads are sources of non-point source pollution and that the harvesting of trees is not an industrial activity requiring an NPDES permit for channeled runoff, the Ninth Circuit has jeopardized the continued viability of amici states' BMP programs.

It is for these reasons that amici states urge this Court to grant certiorari.

C. The Ninth Circuit's Decision Creates A Conflict

This Court should grant the Petitions for Writ of Certiorari because the decision by the Ninth Circuit creates a conflict. When there is a split of opinion between circuits as to interpretation of a regulation or

statute, it creates legal uncertainty and confusion for the regulatory agencies as well as the regulated community.

EPA's Silvicultural Rule, found at 40 C.F.R. § 122.27, clearly distinguishes between silvicultural activities that are point source, and thus require NPDES permits, and those that are non-point source and do not require a NPDES permit. The rule states "The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, *or road construction and maintenance* from which there is natural runoff." 40 C.F.R. § 122.27(b) (emphasis added). The language in this rule is clear and unambiguous. It has been reviewed by many courts and has been followed nationwide; even in the Ninth Circuit until this decision.

The Ninth Circuit's decision directly conflicts with the Eighth Circuit's decision in *Newton County Wildlife Association v. Rogers*, 141 F.3d 803 (8th Cir. 1998). In the *Newton* case an environmental group sued the U.S. Forest Service advancing several claims regarding a sale of timber, one of which was that the Forest Service should be required to obtain a NPDES permit for discharges of pollutants associated with logging and road construction. The Eighth Circuit decided these "contentions are without merit." *Id.* at 810. In the *Newton* case the Eighth Circuit stated: "EPA regulations do not include the logging and road

building activities cited by the Wildlife Association in the narrow list of silvicultural activities that are point sources requiring NPDES permits." *Id.*

The Ninth Circuit decision runs contrary to all then-existing judicial interpretations of the Silviculture Rule. *See, e.g., Sierra Club v. Martin*, 71 F.Supp.2d 1268 (N.D. Georgia 1996). In this case various environmental groups sued claiming that a sale of timber would create a large amount of discharge to waters of the United States and that the U.S. Forest Service should have obtained a NPDES permit. The Court stated: "Because none of the discharges about which Plaintiffs complain relates to rock crushing, gravel washing, log sorting, or log storage facilities, they are 'non-point' sources for purposes of the Clean Water Act and do not require an NPDES permit." *Id.* at 1305. The Court reached this conclusion after a review of the CWA in which the Court found "the legislative history and the implementing regulation of the Clean Water Act show that Congress and the Environmental Protection Agency intended to exempt most silvicultural activities from the Clean Water Acts permit requirements." *Id.* The Court then went a step further and examined specifically the complaint of Plaintiffs that most of the discharge would result from logging road construction. The Plaintiffs argued "the runoff from the logging roads in issue will cause 'unnatural' as opposed to 'natural' runoff and, thus, becomes a point source for purposes of the Clean Water Act." *Id.* at 1306. The Court reasoned that "reading the exemption for road construction and

maintenance as narrowly as Plaintiffs urge would run counter to the EPA's intent to exclude timber harvesting and road construction and maintenance and to limit the Clean Water Act's permit requirements to only a few silvicultural activities." *Id.*

In *Waltman v. King William County School Board*, 2010 EL 10006889 (E.D. Virginia 2010), the court recognized that not all stormwater needs a permit. There the Plaintiff claimed that the School Board discharged pollutants onto her property and did not obtain a NPDES permit. The Court ruled: "the Clean Water Act does not require the EPA to regulate all stormwater discharges, nor does it require EPA to use NPDES permits to regulate those discharges EPA does designate for regulation." *Id.* at 3 (*citing Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F.Supp.2d 325, 331 (D. Vermont 2004). These cases are just a few examples of how the Silvicultural Rule has been interpreted by courts. The Ninth Circuit purports to recraft the heretofore unambiguous definition of non-point source in the Silvicultural Rule and in doing so has disregarded the plain language of the CWA, the plain language of the Silvicultural Rule, EPA's original and consistent interpretation of the rule, and every existing judicial interpretation.

Congress did not intend for the CWA to result in a patchwork of uneven regulation due to inconsistent interpretations by the Courts. Amici states are convinced that a denial of certiorari by this Court will result in environmental groups being emboldened to file future citizen suits under the CWA in an effort to

extend the reach of the Ninth Circuit's decision in this case into other circuits. This Court should grant the Petition for Writ of Certiorari to restore the proper, and appropriately deferential, interpretation and application of the Silvicultural Rule of the CWA.

CONCLUSION

Based upon the above stated arguments, the amici states respectfully request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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OCTOBER 14, 2011

Nos. 11-338, 11-347

In The Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ASSOCIATION OF OREGON COUNTIES, IDAHO ASSOCIATION OF COUNTIES, ASSOCIATION OF O & C COUNTIES, AND DOUGLAS COUNTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS DOUG DECKER, ET AL., AND PETITIONERS GEORGIA-PACIFIC WEST, INC., ET AL.

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Pursuant to Supreme Court Rule 37, the Association of Oregon Counties, Idaho Association of Counties, Association of O & C Counties, and Douglas County (collectively "Counties") respectfully submit this brief *amici curiae* in support of Petitioners Doug Decker, et al. and Petitioners Georgia-Pacific West, Inc., et al.[1]

INTEREST OF *AMICI CURIAE*

The Association of Oregon Counties ("AOC") is an intergovernmental agency of county governments established under the laws of Oregon. The AOC has no subsidiary or parent organizations, and it has no shareholders. AOC is an advocate for county government and county officials in their relationships with Congress, the Oregon Legislature, and the various federal and state agencies.

The Idaho Association of Counties ("IAC") is a non-profit, non-partisan service organization dedicated to the improvement of county government. IAC was designed and incorporated by county elected officials

[1] All counsel of record have consented to the filing of this brief. Petitioners Georgia-Pacific West, Inc., et al., Petitioners Decker, et al., and Respondents have all filed blanket consents. In accordance with Rule 37.6, *amici* state that no counsel for a party authored or authorized this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

under Idaho law and under Section 501(c)(4) of the Internal Revenue Code to provide services, research, uniformity, and coordination among member counties in order for county elected officials to better serve their constituents. IAC has no subsidiary or parent organizations. Its members are the 44 Idaho counties.

The Association of O & C Counties ("Association") is an unincorporated, voluntary association of the 18 counties in western Oregon that are the beneficiaries of the lands managed by the Bureau of Land Management under the O & C Act of 1937 (Act of Aug. 28, 1937, c. 876, Title I, §1) (43 U.S.C. §1181a *et seq.*). The Association has no subsidiary or parent organizations and has no shareholders.

Douglas County is a county government established by the State of Oregon and as such has no subsidiary or parent organizations, nor any shareholders. Douglas County maintains a system of county roads over which the public has a right of use for forestry, industrial, recreational, domestic and general use.

The Counties have a vital interest in the definitive resolution of the question whether the runoff from that subset of their public roads that are used as logging roads are subject to the permitting requirements of the National Pollutant Discharge Elimination System ("NPDES") of the Clean Water Act ("CWA") (33 U.S.C. §1342).

INTRODUCTION

In *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011), the Ninth Circuit ruled that the storm water runoff from logging roads that is collected and then discharged by ditches, culverts and channels is a point source discharge for which a permit is required under the National Pollutant Discharge Elimination System provisions of the Clean Water Act pursuant to 33 U.S.C. §1342.

Before the Ninth Circuit, the State of Oregon and the Environmental Protection Agency ("EPA") argued that these roads have been exempted from NPDES permitting under EPA's Silvicultural Rule and under EPA's Storm Water Rules. In rejecting these arguments the Ninth Circuit failed to give deference to the long-standing interpretations of EPA on this precise issue. As both the Petitioners have argued, the Ninth Circuit's decision is wrong as a matter of basic statutory interpretation.

The Counties agree with the Petitioners' positions and wish to bring to the attention of the Court the unwarranted burden the Ninth Circuit's ruling places on the counties. The ruling imposes a costly and unwarranted permitting burden on county governments nationwide to address runoff that EPA and the respective states have addressed in their respective nonpoint source control programs.

SUMMARY OF ARGUMENT

In enacting the Clean Water Act, Congress delegated to the Environmental Protection Agency ("EPA") the authority to adopt a consistent program to regulate point sources[2] and nonpoint sources of pollution. Among the rules EPA promulgated to implement the CWA was the Silvicultural Rule wherein EPA clarified which silvicultural practices were point sources to be regulated under the National Pollutant Discharge Elimination System (33 U.S.C. §1342) and which of these practices were to be regulated under the respective state's nonpoint pollution control systems (33 U.S.C. §1329). EPA's Silvicultural Rule clarified that the runoff from timber harvest activities was to be managed as a nonpoint source. The Ninth Circuit erred in failing to defer to EPA's reasonable interpretation that these silvicultural activities were to be controlled under the various states' nonpoint source programs.

Secondly, in the 1987 amendments to the CWA Congress directed EPA to establish a program to regulate the storm water discharges "associated with industrial activity." 33 U.S.C. §1342(p)(2)(B). EPA

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[2] The "term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. The term does not include agricultural storm water discharges and return flows from irrigated agriculture." 33 U.S.C. §1362(14).

subsequently through notice and comment rulemaking defined these discharges as only those discharges that were directly related to manufacturing, processing or raw materials storage areas at an industrial plant. 40 C.F.R. §122.26(14). The Ninth Circuit improperly rejected EPA's interpretation of the ambiguous phrases found in the storm water statutes as well as EPA's interpretation of the ambiguous phrases found within its own regulations.

Third, the Ninth Circuit in requiring NPDES permits for the ditches, culverts and conveyances along primarily logging roads, improperly rejected the EPA's reasoned interpretation that the phrase "immediate access roads" in the context of storm water "associated with an industrial activity" did not include state, local or federal roads. "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 FR 47990-01, 1990 WL 348331 (FR), p. 34.

Fourth, by redefining as point sources those county and state roads that are used to access industrial operations, the Ninth Circuit imposed a costly and unnecessary permitting burden on county governments.

ARGUMENT

The Ninth Circuit's far-reaching decision in *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011), displaced the long-standing manner in which the Environmental Protection

Agency and the State of Oregon implement the storm water control provisions of the CWA (33 U.S.C. §1342(p)) and should therefore be reversed. The decision below was not only inconsistent with the State of Oregon's and EPA's long-standing interpretations, if left in place it could have serious repercussions on the counties and their ability to maintain their road systems while meeting their other statutory public service obligations.

I. The Ninth Circuit's rejection of EPA's reasonable interpretation of the Clean Water Act is unwarranted.

In *Northwest Environmental Defense Center v. Brown*, the Ninth Circuit shifted the management of storm water runoff associated with logging roads from the traditional nonpoint source control programs, 33 U.S.C. §1329, that are generally managed by the respective States, to a system requiring NPDES permitting for all the culverts and ditches along logging roads under 33 U.S.C. §1342.

Northwest Environmental Defense Center ("NEDC") challenged EPA's and the State of Oregon's long-standing interpretations by alleging that the State of Oregon as the owner, or as the operator, of the Trask River Road and the Sams Down Road[3] was in

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Part of the Trask River Road is a county road that traverses lands owned by the State of Oregon. Sams Down Road is a State owned road. Both roads are used by timber purchasers

(Continued on following page)

violation of the CWA by allowing the discharge of storm water runoff from these logging roads without first acquiring a NPDES permit.

NEDC contended that since these roads were used to haul timber to sawmills the storm water runoff from these roads represented a "discharge associated with industrial activity" and as such the roads were automatically subject to the NPDES permitting requirements under 33 U.S.C. §1342(p)(2)(B). NEDC sought to shift the storm water control focus from the State of Oregon's approved nonpoint pollution control program to a NPDES permitting program.

The Defendants Decker, et al., and Intervenor-Defendants Georgia-Pacific West, Inc., moved to dismiss the case based on EPA's Silvicultural Rule, 40 C.F.R. §122.27, and EPA's Storm Water Rule, 40 C.F.R. §122.26, under which logging roads were excluded from the NPDES permitting requirements. EPA filed an *amicus* brief in support of the motion to dismiss, explaining that storm water runoff from logging roads was not the type of discharge Congress had directed be subject to permitting (*See* United States' *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, 3:06-cv-01270 filed Dec. 6, 2006, C.R. 44).

The Ninth Circuit rejected EPA's interpretation of the CWA and crafted an entirely new program to

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to remove timber harvested from State of Oregon owned forest lands.

control runoff from logging roads. This judicially created program ignored not only the long-standing interpretations of EPA and the State of Oregon that runoff from nonpoint pollution sources was to be controlled by the States, and ignored EPA's Silvicultural Rule designating these forest practices as nonpoint sources.

A. The Silvicultural Rule was an appropriate interpretation of the Clean Water Act.

The Silvicultural Rule distinguished which silvicultural activities were to be "silvicultural point sources" and subject to permitting (40 C.F.R. §122.27), as opposed to those "silvicultural nonpoint sources" which were subject to State management.

During its rulemaking EPA defined the "silvicultural point sources" as:

> any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States.

40 C.F.R. §122.27(b)(1).

In response to comments raised during the rulemaking, EPA clarified that the logging roads were

nonpoint sources when it stated that the term silvicultural point sources:

> does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, ***harvesting operations, surface drainage,*** *or* ***road construction and maintenance from which there is natural runoff.***

40 C.F.R. §122.27(b)(1) (***emphasis*** added).

The Ninth Circuit rejected EPA's long-standing interpretation and displaced it with the Panel's own interpretation that culverts and ditches along logging roads are point sources to be regulated under the NPDES permitting program.

The Ninth Circuit ignored that when, as in this situation, Congress has delegated to the agency the authority to implement a statute and the agency has interpreted ambiguous provisions thereof through rulemaking, then the Court is not to substitute its own construction of the statutory provision for a reasonable interpretation made by the administrator of the agency. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). The views of EPA, the agency charged with implementing the Clean Water Act, as established in the 1976 Silvicultural Rule, are entitled to *Chevron* deference.

B. EPA's interpretation of the discharges subject to the Phase-1 and Phase-2 Storm Water Rules was well reasoned and appropriate response to public notice and comment rulemaking.

EPA's interpretation that only a limited subset of silvicultural activities were considered point sources was also reflected in EPA's 1990 rulemaking relative to the storm water discharges associated with industrial activities. During this rulemaking EPA interpreted the phrase "storm water discharge associated with industrial activity," that was included in the 1987 storm water amendments to the CWA, as excluding those discharges previously excluded from the NPDES program under EPA regulations – such as those associated with facilities and activities excluded under the Silvicultural Rule.[4]

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[4] In its 1990 rulemaking, EPA specifically reexamined whether logging should be included as an activity associated with an industrial activity or facility and elected to continue to exclude these activities. In response to a commenter's statement that runoff from logging operations should be controlled by BMPs in effect for such industries and that a permit would be impractical and cost prohibitive, EPA stated:

> "EPA agrees with the commenter that this provision needs clarification. The existing regulations at 40 CFR 122.27 currently define the scope of the NPDES program with regard to silvicultural activities. 40 CFR 122.27(b)(1) defines the term 'silvicultural point source' to mean any discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with

(Continued on following page)

As part of the 1987 amendments to the CWA, Congress adopted a two-phase approach to management of storm water discharges. During the first phase, Congress directed that five specific types of storm water discharges were to be automatically subject to permitting ("Phase I"). 33 U.S.C. §1342(p)(2) & (3). Among these Phase 1 storm water discharges were "discharges associated with industrial activities." 33 U.S.C. §1342(p)(2). With respect to the remaining non-Phase 1 storm water discharges, Congress directed that EPA, in consultation with the States, was to identify which of these other forms of storm water discharges existed and were not regulated under Phase I. 33 U.S.C. §1342(p)(5). Based on these

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> silvicultural activities and from which pollutants are discharged into waters of the United States. Section 122.27(b)(1) also excludes certain sources. The definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under NPDES. EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking. Accordingly, the definition of 'storm-water discharge associated with industrial activity' does not include sources that may be included under SIC 24, but which are excluded under 40 CFR 122.27."

55 FR 47990-01, 48011; 1990 WL 348331 (FR), p. 37.

In 1990 EPA specifically considered the issue of what silvicultural activities were subject to NPDES permitting and reaffirmed its earlier decision that the silvicultural activities (*e.g.*, harvesting operations, surface drainage and road construction and maintenance) that had been previously identified as not subject to NPDES permitting were also excluded from permitting under the Storm Water Rule.

studies, EPA in consultation with State and local officials issued regulations to address the non-Phase 1 storm water discharges that the EPA deemed necessary. 33 U.S.C. §1342(p)(5)(C) & (6). The non-Phase I discharges that EPA determined were to be subject to permitting became known as Phase II discharges.

In the 1987 amendments to the CWA, Congress left to the discretion of EPA several key elements of the industrial storm water discharge program. For example it left it to EPA to precisely define any ambiguous phrases (*e.g.*, "associated with industrial activity" as referenced in 33 U.S.C. §1342(p)(2)(B)), and, granted to EPA the express authority to identify the non-Phase 1 storm water discharges for which control methods and procedures were necessary. 33 U.S.C. §1342(p)(5).

In response, EPA undertook public notice and comment rulemaking wherein it adopted the "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 FR 47990-01, 1990 WL 348331 (FR) and defined therein the phrase "associated with industrial activity" as:

> [s]torm water discharge associated within industrial activity means[5] the discharge from any conveyance that is used for collecting

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[5] The use of the verb "means" indicates a narrower textual meaning than the phrase "includes." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 132 S. Ct. 2156, 2170 (2012).

> and conveying storm water and that is ***directly[6] related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.***[7]

40 C.F.R. §122.26(b)(14) (***emphasis*** added).

EPA thereby effectively established a three part test that required there be: first, a direct relationship – rather than an indirect relationship – between the road and the industrial activity; secondly, that the activity be one of the specific activities identified (*e.g.*, manufacturing, processing or raw materials storage); and, third, that the discharge occur from a conveyance directly related to the "areas" used at an industrial plant for manufacturing, processing or raw materials storage. Neither the Trask River Road nor the Sams Down Road met any of these elements.

During the 1990 rulemaking, EPA also interpreted the phrase "associated with industrial activity" as not including activities that were excluded from NPDES permitting pursuant to 40 C.F.R. §122. Among these excluded activities were the activities

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[6] Black's Law Dictionary (Sixth Edition) defines "direct" as "immediate; proximate; by the shortest course; without circuitry; operation by an immediate connection or relation; instead of operating through a medium; the opposite of indirect."

[7] Part 122 is a reference to 40 C.F.R. §122 which includes among other items the Silvicultural Rule.

previously described in the 1976 Silvicultural Rule as nonpoint sources. *See* 40 C.F.R. §122.27.

The Ninth Circuit erred in rejecting EPA's interpretation that the phrase "associated with an industrial activity" was an ambiguous phrase left to EPA to define by regulation, and, erred in rejecting EPA's reasonable interpretation that the nonpoint runoff identified by the Silvicultural Rule did not represent "discharges associated with an industrial activity."

The Ninth Circuit also overlooked that in addition to the limitations expressly stated in 40 C.F.R. §122.26(b)(14), EPA had also clarified in the 1990 rulemaking that

> [f]or the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; ***immediate access roads and rail lines*** used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites;. . . .

40 C.F.R. §122.26(b)(14)(ii) (***emphasis*** added).

While the Ninth Circuit concluded that a road used for logging purposes represented an *immediate access road* that is exclusively or primarily dedicated for use by the industrial facility, it failed to defer to EPA's long-standing interpretation that the phrase "associated with industrial activity" required that the discharge from an immediate access road must be not only from a ditch or culvert that is used to collect and

convey storm water, it must also be "***directly related*** to manufacturing, processing or raw materials storage **areas *at an industrial plant***." (40 C.F.R. §122.26(b)(14)) (***emphasis*** added) – not as in this case roads that are only indirectly related to the industrial plant areas.

In its 1990 rulemaking EPA clarified that it:

> intends the language 'immediate access roads' (including haul roads) to refer to roads which are ***exclusively or primarily dedicated for use by the industrial facility***.

55 FR 47990-01 at 48009; 1990 WL 348331 (FR), p. 34 (***emphasis*** added). This limitation emphasized that the roads were to be directly related to a specific industrial facility.

In taking an expansive view of the "primarily dedicated" aspect of this rule, the Panel not only overlooked this limitation, it also overlooked the subsequent sentence in the same paragraph wherein EPA clarified that the phrase "associated with an industrial facility" did not include state, county or federal roads.

> EPA does not expect facilities to submit permit applications for discharges from ***public access roads such as state, county, or federal roads such as highways or BLM roads which happen to be used by the facility***.

55 FR 47990-01 at 48009; 1990 WL 348331 (FR), p. 34 (***emphasis*** added).

The EPA's interpretation was a significant qualifier. By publishing the interpretation in the Federal Register concurrent with its adoption of the final rule, EPA clearly informed regulated parties of EPA's interpretation and EPA left little question that it considered that the public roads were not included within the phrase "immediate access roads."

In classifying the Trask River Road and the Sams Down Road as immediate access roads, the Ninth Circuit deferred to one element of EPA's clarification but overlooked other language in the same paragraph wherein EPA expressly excluded from the definition of "immediate access roads" the state, county and federal roads.

The Panel's decision that the Trask River Road and the Sams Down Road are exclusively or primarily dedicated for use by an industrial facility has swept into the NPDES permitting process not only private roads that were previously excluded under the Silvicultural Rule, but also large numbers of public roads owned and managed by the various counties – roads EPA had previously excluded from the definition of "immediate access roads" in the Storm Water Rules.

Since EPA was delegated the authority to interpret the CWA's storm water provisions, and inherent within this delegation was the authority to adopt regulations relative to the reach of the ambiguous phrase "associated with industrial activity," *Chevron* deference to EPA's interpretation is warranted.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

Under *Chevron*, EPA's interpretation that state, county and federal roads are not immediate access roads associated with industrial activity, is binding unless the rulemaking was procedurally defective, arbitrary or capricious in substance or manifestly contrary to the statute. *Id.* at p. 844. None of these procedural defects were present in the 1990 rulemaking.

EPA's interpretive choice that the state and county roads are not "immediate access roads" is a well-reasoned interpretation based on the experience and informed judgment of the agency, an interpretation that was developed based upon public comment during the concurrent rulemaking as well as in response to EPA's prior studies conducted under 33 U.S.C. §1342(p)(5). The judgment of EPA in this matter reflected a well-reasoned guidance. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998).

Further, EPA's definition and interpretation that the state and local roads are not immediate access roads is an interpretation of ambiguous language in its own rule thereby warranting decisive weight. It represents a fair and considered interpretation of an ambiguous phrase – "immediate access roads" – made at the time of adoption of the regulation and was not a *post hoc* rationalization. *Auer v. Robbins*, 519 U.S. 452, 462 (1996).

Likewise, EPA's interpretation should be afforded persuasive weight since it was developed after thorough study of the storm water discharges and followed public notice and comment rulemaking; represented valid reasoning; and, was consistent with its own rules and pronouncements. *See generally*, *Christopher v. SmithKline Beecham Corp.*, 547 U.S. ___, 132 S. Ct. 2156, 2166-69 (2012).

The Ninth Circuit's ruling must be reversed for failing to defer to EPA's and the State of Oregon's long-standing interpretation of the CWA relative to management of storm water discharges from logging roads; and, by failing to defer to EPA's long-standing interpretation that State or county roads are not local access roads associated with an industrial activity. As a result of these errors, the Ninth Circuit has upset the established CWA management programs and imposed a substantial burden on otherwise financially strapped counties.

While the Ninth Circuit appears to have assumed that the "primary logging roads" are built and maintained solely by the logging companies or by the operators of an industrial facility (*see Northwest Environmental Defense Center v. Brown* at p. 1084), this assumption is clearly in error. In this case, the Trask River Road and the Sams Down Road are State and county owned roads. What the Panel overlooked is that a large number of local access roads, if not the majority, are owned, built and maintained by Oregon Counties, the State of Oregon, the United States

Forest Service or the United States Bureau of Land Management.[8]

Reversal is warranted in that the Ninth Circuit has established a new and unprecedented burden requiring NPDES permitting for County roads merely because they are used for logging purposes. This drastic shift in the manner in which the CWA is implemented warrants reversal by this Court.

II. The NEDC decision will impose extensive and cost prohibitive permitting costs on local governments thereby restricting their ability to provide essential public services.

The Ninth Circuit's new NPDES permitting requirement on county roads used for logging purposes imposes an extensive and cost prohibitive permitting and monitoring requirement upon the counties – a burden they can ill afford without sacrificing funding for other essential services.

To illustrate the magnitude of the problem created by the Ninth Circuit's decision, the Association of Oregon Counties surveyed the various County Road Supervisors in Oregon to determine the number of County roads that would be defined as "primarily

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[8] While the Ninth Circuit recognized that these public roads afforded access for logging and for recreation purposes, it failed to recognize that these public roads also provide other significant public functions including residential, utility and public safety access.

logging roads" as that phrase was used in the Ninth Circuit's decision. *See* Association of Oregon Counties, *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95).

The County Road Supervisors identified that the county road systems within Oregon contain approximately 4,800 miles of roads that fall within what the Ninth Circuit defined as "primarily logging roads." Association of Oregon Counties *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95).

The Road Supervisors calculated that associated with these 4,800 miles of primary logging roads are approximately 20,000 cross culverts (culverts that cross under the primary logging road). Not included within this analysis are the culverts that do not cross under these "primary logging roads" but cross connecting side roads or private access driveways. Association of Oregon Counties, *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95)).

In addition to the "primary logging roads" identified by the County Road Supervisors, the Association of O & C Counties also identified within the 2.1 million acres managed by the Bureau of Land Management ("BLM") within Oregon an additional 16,817 miles of "primary logging roads" along with 40,500 culverts. Association of Oregon Counties *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v.*

Brown, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95).

Likewise, with respect to the Forest Service's roads in Oregon, the Oregon Department of Transportation in its 2009 Oregon Mileage Report also identified that there were 6,612 miles of Forest Service roads that are mostly logging roads. (Oregon Department of Transportation website; 2009 Mileage Report, p. 163) (http://www.oregon.gov/ODOT/TD/TDATA/rics/PublicRoadsInventory.shtml#Oregon_Mileage_Report) (last accessed August 3, 2012).

While a separate NPDES permitting system for the "primary logging roads" does not currently exist, the magnitude of the problem facing the counties can be quantified if one assumes that the same application requirements that are currently required for storm water discharges associated with industrial activity will be imposed for these "primary logging roads." *See* 40 C.F.R. §122.26(c).

Under 40 C.F.R. §122.26(c), each culvert and ditch that discharges storm water will require a NPDES permit application that includes at a minimum:

(a) a site map with topography, drainage structures, underground springs (40 C.F.R. §122.26(c)(1)(i)(A));

(b) an estimate of impervious surfaces and the total area drained by each outfall, along with a narrative of the past activities (40 C.F.R. §122.26(c)(1)(i)(B));

(c) certifications that each of the outfalls has been tested for non storm water discharge (40 C.F.R. §122.26(c)(1)(i)(C));

(d) information regarding significant spills of toxic or hazardous pollutants at the facility (40 C.F.R. §122.26(c)(1)(i)(D)); and,

(e) sample data collected during storm events from each of the outfalls (40 C.F.R. §122.26(c)(1)(i)(E)).

The requirement of subpart (b) that the owner of the primary logging road provide a narrative on past activities that have occurred within the drainage, standing alone, imposes an impossible burden on the counties since these past activities were often undertaken by adjacent landowners or operators. If the owner of the logging road is a county or other governmental entity, it is being placed in the position of collecting enormous amounts of data from the landowners or operators adjacent to its county road system yet these landowners have little incentive or requirement to provide this data.

Based upon the number of miles of "primary logging roads" identified by the various County Road Supervisors, the Association of Oregon Counties' Road Engineer estimated that to obtain permits for all of the cross culverts and roadway ditches associated with just the 4,800 miles of "primary logging roads" under county jurisdiction, there would be a permitting cost to the Oregon counties of approximately $56,000,000 (20,000 culverts x 40 hours staff time per

permit x $70 per hour = $56,000,000). Association of Oregon Counties, *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95). This initial cost will be repeated as the permits expire and are renewed.

Not included within these estimates is the required pre-application sampling of each outfall during a storm water runoff event as required under 40 C.F.R. §122.26(c)(1)(i)(E) – a storm water sampling program that will be a staggering burden in its own right.

The data collection provisions of 40 C.F.R. §122.26(c)(1)(i)(E) require:

> "[q]uantitative data based on samples ***collected during storm events*** and collected in accordance with 122.21 of this part ***from all outfalls*** containing a storm water discharge associated with industrial activity for the following parameters: . . .
>
> (3) Oil and grease, pH, BOD5, COD, TSS, total phosphorous, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;
>
> * * *
>
> (5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation;
>
> (6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements

> or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours)."

(***emphasis*** added).

As with the requirement under 40 C.F.R. §122.26(c)(1)(i)(B) to obtain data as to the land practices in the drainage area of each culvert or ditch, to obtain this storm event data for each culvert or ditch outfall along the 4,800 miles of county owned "primary logging roads," as well as for the accompanying 20,000 cross culverts, imposes a staggering burden on the Oregon counties. Likewise, the burden on the various State and Federal permitting agencies to simply process the permit applications would also be staggering.

Oregon is not unique, for a similar burden will be experienced by forested counties in other States as well. To demonstrate the fiscal impact in other States, the Idaho Association of Counties surveyed the Road and Bridge Supervisors in Boundary County[9] and

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[9] Boundary County is located in the Northern Panhandle of Idaho bordering Canada. Boundary County has a population of 10,972 and a land area of 1,278.21 square miles, 90.4% of which is forested. The Boundary County Road and Bridge Department has jurisdiction over 340 miles of roads and bridges.

Valley County[10] to determine the number of county roads in each county that would be "primary logging roads" as that phrase was used in the Panel's decision.

The County Road Supervisors in these two counties identified that their respective county road systems include approximately 258 miles of "primary logging roads"[11] and approximately 1,807 cross culverts (culverts that cross under the county road) associated with these "primary logging roads."[12]

The Idaho Association of Counties estimates that if all cross culverts and roadway ditches required a NPDES permit, then for the 125 miles of "primarily logging roads" in Boundary County and their accompanying culverts under county jurisdiction, there would be a permitting cost to the Boundary County of approximately $1,318,800 (471 culverts x 40 hours staff time per permit x $70 per hour = $1,318,800). If required to comply with NPDES permitting requirements during FY2012, Boundary County would have been required to spend an estimated 55.7% of its

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[10] Valley County is located in South-Central Idaho and has a population of 9,862 and a land area of 3,733.66 square miles, 84.2% of which is forested. The Valley County Road and Bridge Department has jurisdiction over 763 miles of roads and bridges.

[11] The Ninth Circuit did not provide any guidance in defining the ambiguous phrase "primary logging roads," therefore the County Road Supervisors took a very conservative approach as to what roads would be included within this definition.

[12] Not included within this analysis were the culverts that do not cross under these "primary logging roads" but cross connecting side roads or private access driveways.

annual Road and Bridge Department Budget on compliance with NPDES permitting requirements for these "primary logging roads."[13]

Similarly, based upon the number of miles of "primary logging roads" identified by the Valley County Road Supervisor, the Idaho Association of Counties estimates that if all cross culverts and roadway ditches required a NPDES permit in Valley County, then for the 133 miles of "primarily logging roads" and their accompanying culverts under county jurisdiction, there would be a permitting cost to the county of approximately $3,740,800 (1,336 culverts x 40 hours staff time per permit x $70 per hour = $3,740,800). These NPDES permitting requirements would require Valley County to budget an estimated 75.1% of its annual Road and Bridge Department Budget on compliance with NPDES permitting requirements for these "primarily logging roads."[14]

These costs reflect only data on "primary logging roads" of two of the counties in Idaho. The statewide impact will be higher as the "primary logging road" permitting requirement is applied to the 32 other timber counties in the State.

The imposition of this new burden on the counties is occurring at a time when the counties with the

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[13] The FY2012 Road and Bridge Department budget for Boundary County was $2,369,701.

[14] The FY2012 Road and Bridge Department budget for Valley County is $4,981,588.

highest percentages of forest lands (federal, state and private), are facing dramatic reductions in the funding available for their road programs.

An example of the reduction in funding is dramatically illustrated by the reduction in U.S. Forest Service receipts transferred to the local counties for roads. Under the revenue sharing provisions of 16 U.S.C. §500 the counties receive 25% of the timber sale receipts generated from Forest Service timber sales within the respective counties for the purposes of funding local schools and roads. In 1990, immediately prior to the listing of the northern spotted owl under the Endangered Species Act (16 U.S.C. §1533), and, the subsequent shift in national forest policy with the adoption of the Northwest Forest Plan, the Oregon counties received $112,197,903 as their share of road receipts from the sale of timber harvested from the U.S. Forest Service lands.[15]

While federal programs (*e.g.*, Secure Rural Schools and Community Self-Determination Act of 2000 (Public Law 106-393 and extensions thereof)) have provided a safety net to avoid bankrupting county road programs as a result of reduced federal timber harvests, these federal safety net programs have dramatically declined and are currently on a year-by-year basis. For example, the current safety

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[15] In Oregon, these road funds are part of the respective general road funds of the counties and required to be used solely on the county's roads (ORS 368.705(2)).

net road funding for Oregon counties is now at $42,000,000 – a 64% decrease since 1990. If these safety net programs were not in place, the funding that the Oregon counties would have received from the actual harvest of timber from U.S. Forest Service lands in Oregon during the 2001 to 2011 time period would have been on average in the range of $3 to $4 Million annually – a decrease of 96-98% in road funding. *See* Association of Oregon Counties' website "History of USFS Payments to County Road Funds," http://www.aocweb.org/aoc/LinkClick.aspx?fileticket=YBpefzllB2I%3d (last accessed August 3, 2012). This reduction in road receipts affects most Oregon counties but hits hardest in those counties wherein the Federal forests represent the majority of the land base.

This reduction is particularly significant in Douglas County, a county with over 80% of its landmass within forests and, in turn, a large number of county roads used for logging purposes.[16] A Place called Douglas County, Douglas County Planning Department, 2nd ed. 1990.

Since the 2007 fiscal year, Douglas County has seen its federal forest revenues dedicated for road purposes decrease from $14,417,000 to the current

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[16] The majority of the forested lands within Douglas County are publically owned by the Federal agencies (*e.g.*, Bureau of Land Management and the United States Forest Service). A Place called Douglas County, Douglas County Planning Department, 2nd ed. 1990.

$5,533,335 for Fiscal Year 2011.[17] This 62% reduction in funding resulted in the Douglas County's Public Works Department reducing its spending on road maintenance 25% during this time period. In the event the Federal safety net programs are not renewed and the revenue sharing reverts back to the actual timber harvest receipts, Douglas County would be forced to further reduce its road maintenance programs or reallocate general funds from other programs such as public safety. The Ninth Circuit's imposition of a new NPDES permitting requirement for county roads used for logging purposes, comes at a time when revenue sources for public roads is dramatically being reduced and would therefore require a significant portion of the county road fund to be used to obtain permits rather than on-the-ground maintenance. In this case, for Douglas County the cost of NPDES permitting the 200 miles of forest roads that the Douglas County Public Works Department concluded were "primarily logging roads" is conservatively estimated at $1,120,000. This NPDES permitting cost represents 20% of Douglas County's Fiscal Year 2011 federal road receipts.

During this period of dwindling U.S. Forest Service receipts, the counties' general operating budgets have likewise been reduced, forcing reductions in road departments as well as other programs.

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[17] In Fiscal Year 2011 the Douglas County Public Works Department budget was $13,937,000.

For example, in the face of reduced Federal payments within the counties wherein the Forest Service and the BLM manage large percentages of the land base, counties have been forced to close libraries, lay off sheriff deputies and close jail beds. As a result of sharp reductions in revenues, at least two Oregon counties have been forced to release prisoners prior to their term of sentence or prior to trial. Adding an additional $56 Million cost to comply with the NPDES permitting requirement on these already cash strapped counties will constitute a significant social and economic burden on the counties yet afford little, if any, concurrent increase in water quality benefits.

Increasing the complexity of the issue are the reciprocal rights-of-way associated with the 1937 O & C Act lands managed by the Bureau of Land that creates a checkerboard of intermingled private and public land ownerships in Oregon. Access across this checkerboard is provided through numerous right-of-way agreements that provide the United States and the private landowners with the right to use and construct logging roads on each other's property. (*See* 43 C.F.R. §2812, *et seq.*). As a result of these road agreements, numerous landowners have rights to use roads that they do not directly control; likewise, they own roads that other landowners have rights to use.

Contrary to the Ninth Circuit's assumption that the "primary logging roads" are built and maintained by the logging companies, such is not the case, for there are hundreds, perhaps thousands, of intermingled

private and public owners within the O & C checkerboard, all of whom share the same interconnecting system of "primary logging roads." This interconnecting system of reciprocal rights-of-way is, in most cases, not associated either directly or indirectly with any specific industrial facility.

Unfortunately, the Ninth Circuit did not have the full picture of the storm water and nonpoint pollution control programs before it when the Panel concluded that these County and State roads were subject to NPDES permitting. As a result the Panel cast a broad net in defining primary logging roads without consideration of ownership or operational control.

The Ninth Circuit's NPDES permitting requirement is simply unworkable in that it requires each log-haul operator to have individual permits for culverts that underlie the roads the operator uses in transporting logs or other forest products. Multiple logging operations that all concurrently utilize the same logging roads would mandate multiple NPDES permits for the same culverts and ditches. Likewise, if other users of the road are associated with one of the other industrial activities defined under EPA regulations, then each of these industrial operators would be required to obtain independent NPDES permits for the same culverts and ditches.

The Panel simply miscomprehended the nature of the road system that is utilized for silvicultural purposes. Rather than defer to the established Federal, State and county programs for controlling the

storm water discharges associated with industrial and silvicultural activities, the Ninth Circuit imposed an entirely new interpretation of the CWA – an interpretation that imposes a staggering burden on the counties. To meet this burden, the counties will need to redirect funding from other essential services to fund this new and unwarranted permitting process.

As a result of the Ninth Circuit opinion, those counties with a significant percentage of private and public forest lands within their boundaries are being forced to allocate their dollars to acquire permits for activities that have limited impact on water quality rather than fund essential public services.

III. The State of Oregon controls storm water runoff associated with forest roads through an extensive program of regulations and best management practices.

An NPDES permit for county owned roadway culverts and ditches is simply the wrong tool for controlling water quality impacts associated with roads utilized for logging purposes. EPA has studied the question of the best management strategies for storm water runoff and recognized that the best control mechanisms are through the respective states' nonpoint pollution programs and not through the NPDES permitting process. The primary sources of pollution through a roadway culvert or ditch along these roadways is actually generated by activities conducted by the forest land owners who are not

necessarily the owners of the road. The county road authority seldom has the authority to control these activities, whether they are done on private land or land owned by another public agency.

The Ninth Circuit ignored that Congress has chosen to focus the CWA's NPDES permitting requirements on discharges of pollutants from point sources and a select number of storm water discharges, 33 U.S.C. §1342, rather than require NPDES permitting for runoff associated with nonpoint sources of pollution.

In accord with this focus, EPA's long-standing interpretation of the CWA storm water provisions has been that the subgroup of storm water discharges associated with silvicultural activities, including logging roads, was not subject to NPDES permitting; rather, these discharges were to be controlled as part of the State's primary responsibility to prevent, reduce and eliminate pollution, 33 U.S.C. §1251(b). The State of Oregon elected to address this responsibility through its nonpoint source control programs implemented under 33 U.S.C. §1329 and 33 U.S.C. §1288 rather than through the NPDES permitting program.

Recognizing that differences in climate and geography make nationwide uniformity in controlling nonpoint source pollution virtually impossible, Congress has traditionally depended on controls State or local in nature to manage these discharges and runoffs. *Oregon Natural Desert Association, et al. v.*

United States Forest Service, 550 F.3d 778, 785 (9th Cir. 2008).

In accord with this policy, and in reliance on its EPA approved nonpoint management program,[18] 33 U.S.C. §1329,[19] the State of Oregon promulgated administrative rules that established control measures to prevent or reduce nonpoint sources of pollution (*see* Oregon Administrative Rules 340-042-0025), including the discharges and runoff associated with silvicultural practices, *see* Oregon Administrative Rules 629, divisions 625, 635, 640, 645, 650, 655, 660.

Specific to logging roads, the State of Oregon incorporated into its Forest Practice Rules a series of best management practices[20] addressing logging road

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[18] Oregon Nonpoint Source Pollution Program 2011 Annual Report; http://www.deq.state.or.us/wq/nonpoint/docs/annualrpts/rpt11.pdf (last accessed August 9, 2012).

[19] The State of Oregon's program of non-point source management was established in 1978 and has been updated annually. (Oregon Nonpoint Source Control Program Plan; 2000 update, http://www.deq.state.or.us/wq/nonpoint/docs/plan/plan.pdf (last accessed August 9, 2012)). The State of Oregon's plan was adopted after public notice and opportunity to comment and was approved by EPA. 33 U.S.C. §1329(a) & (b).

[20] Best Management Practices ("BMPs") represent "schedules of activities, practices (and prohibitions of practices), structures, vegetation, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. *See* 40 C.F.R. §122.2.

construction and maintenance, *see* Oregon Administrative Rules 629-625.[21]

In addition to the best management practices for forestry operations, the State of Oregon also adopted an extensive program of best management practices for maintenance and construction of State highways. *See* Oregon Department of Transportation, Routine Road Maintenance, Water Quality and Habitat Guide Best Management Practices, Revised 2009 ("Blue Book"), http://cms.oregon.gov.com/ODOT/HWY/OOM/docs/blue_book.pdf (last accessed August 9, 2012). Most of the Oregon counties have adopted either the Blue Book as their own best management practices or have adopted their own independent best management practices for culverts, ditches and drains associated with roadways. *See* Marion County, Department of Public Works, Best Management Practices for Clean Water, Crew Manual, Spring 2009, pp. 17-22, http://www.co.marion.or.us/NR/rdonlyres/02DED700-CD42-4D33-83C5-D7481FB54BC1/24075/CrewManual091.pdf. (last accessed August 9, 2012).

The Ninth Circuit's dramatic revision in the manner in which the Clean Water Act is implemented

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[21] EPA recognized the Oregon Department of Forestry ("ODF") as the lead agency for nonpoint source pollution control efforts on State and private forest lands in 1979. ODF has established a series of regulatory management practices with which State and private foresters are required to comply. Oregon Nonpoint Source Control Program Plan; 2000 update, p. 20, http://www.deq.state.or.us/wq/nonpoint/docs/plan/plan.pdf (last accessed August 7, 2012).

is not only costly and unworkable, it is not needed. State and county governments are already conducting their road activities in a manner that ensures the least impact to the water quality.

CONCLUSION

The Court should reverse the decision below and clarify that deference is to be afforded to EPA's interpretation that only those access roads that are "immediately" and "directly" associated with a specific industrial facility are included within that group of access roads associated with an industrial facility. Further, the Court should reverse the Ninth Circuit for failing to afford deference to EPA's interpretation that the phrase "local access roads" as used in its storm water regulations does not include state, local or federal roads. Deference should also be afforded to EPA and the respective states' long-standing interpretation that storm water from roads used for logging purposes is controlled under the nonpoint pollution control programs of the respective states and EPA.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, *et al.*, *Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *Respondent*.

GEORGIA-PACIFIC WEST, INC., *et al.*, *Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR NATIONAL ALLIANCE OF FOREST OWNERS, AMERICAN FARM BUREAU FEDERATION, FOREST RESOURCES ASSOCIATION, EMPIRE STATE FOREST PRODUCTS ASSOCIATION, FLORIDA FORESTRY ASSOCIATION, GEORGIA FORESTRY ASSOCIATION, LOUISIANA FORESTRY ASSOCIATION, MAINE FOREST PRODUCTS COUNCIL, MICHIGAN FOREST PRODUCTS COUNCIL, NEW HAMPSHIRE TIMBERLAND OWNERS ASSOCIATION, SOUTH CAROLINA FORESTRY ASSOCIATION, VIRGINIA FORESTRY ASSOCIATION, AND WASHINGTON FOREST PROTECTION ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Given that challenges to Clean Water Act ("CWA" or "Act") rules must be presented in an action against the U.S. Environmental Protection Agency ("EPA") in a court of appeals within 120 days of promulgation, and that such challenges are not properly raised in an action for civil or criminal enforcement, and where the intended broad scope of the rules at issue were explained by EPA at the time of promulgation but not challenged then, could the intended scope of the rules nonetheless be challenged years later in a district court enforcement action to which EPA is not a party, based on the theory that the intended scope of the rule had been inconsistent with the Act all along and the rule could be read narrowly to make it consistent with the court's interpretation of the Act?

2. In light of EPA's longstanding view that runoff from forest roads is not subject to CWA permitting requirements, with EPA having excluded such activity from permitting in its 1990 Phase I regulations under the 1987 CWA amendments, and with EPA expressing its view that roads built and used for timber harvesting are not "associated with industrial activity," could the Ninth Circuit nonetheless properly hold that runoff from roads used for timber harvesting is necessarily treated as "associated with industrial activity," subject to CWA permitting requirements, without recognizing EPA's existing interpretation and allowing EPA to consider the issue through rulemaking?

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INTERESTS OF *AMICI CURIAE* [1]

The National Alliance of Forest Owners is a trade association that represents owners and managers of over 79 million acres of private forests in 47 states. Its mission is to protect and enhance the economic and environmental values of privately-owned forests through targeted national policy advocacy.

The American Farm Bureau Federation is the largest non-profit general farm organization in the United States, representing more than 6.2 million member facilities in fifty states and Puerto Rico. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers.

The Forest Resources Association is a trade association concerned with the safe, efficient, and sustainable harvest of forest products and their transport from woods to mill. It represents wood consumers, independent logging contractors, wood dealers, forest landowners, and others with an interest in wood supply chain management.

In addition to these national organizations, the *amici* include the following group of state forestry associations from various forested regions across the country: Empire State Forest Products Association (New York), Florida Forestry Association, Georgia

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no persons other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel for *amici* appeared on behalf of intervenors below but did not participate in drafting either Petition. Letters of consent for the submission of this brief are on file with the Clerk.

Forestry Association, Louisiana Forestry Association, Maine Forest Products Council, Michigan Forest Products Council, New Hampshire Timberland Owners Association, South Carolina Forestry Association, Virginia Forestry Association, and Washington Forest Protection Association. Each of these organizations has members, including companies, individuals, and families, that work on, own, or manage forest lands in their respective states. Each of these organizations promotes the stewardship and wise use of forest resources and is dedicated to forest conservation and the sustainable use of natural resources. Each of them has independently decided that for the reasons expressed in this brief, the Petitions present important issues affecting their members and that those issues warrant this Court's attention.

Amici have direct interests in the outcome of this case. These organizations have members who own or manage forest lands and/or roads with stormwater conveyance structures—*e.g.*, ditches and culverts—that, under the Ninth Circuit's decision, would for the first time be subjected to permitting under CWA section 402, 33 U.S.C. §1342. The decision below could require these members to change longstanding practices and obtain permits for discharging stormwater runoff associated with tree harvests and road construction and maintenance, heretofore defined for over three decades by the Silvicultural Rule, 40 C.F.R. §122.27, as nonpoint source discharges not subject to permitting.

The use of ditches and culverts to protect forest roads from the destructive effects of precipitation is integral to building and maintaining those roads. Given the number of such roads and the need for

maintenance, the Ninth Circuit's decision would require the private, state, county, and federal actors that build and maintain roads for timber harvesting to obtain potentially hundreds of thousands (or millions) of section 402 permits. *See* Ex. 1. to Am. Forest Res. Council C.A. *Amicus* Br. ("If the [U.S. Forest Service] is required to obtain permits on a road by road basis, that would mean obtaining up to 400,000 permits."); Am. Loggers Council C.A. Amicus Br. 13 ("At the national level, *Amici* estimate that the decision will create an additional 3,000,000 permit applications, based on number of affected landowners, or 750,000 applications, based on number of tree harvests, or 264,000,000 point source discharges requiring permits."). The expansion of the section 402 permitting program resulting from the Ninth Circuit's decision is well-illustrated by comparing the number of permits this decision will require with EPA's 2009 estimate that the total universe of discharges then requiring permits (individual or general) was only 400,000. *See* Hanlon Decl. in Supp. of Am. Loggers Council C.A. Amicus Br. ¶ 11.

Accordingly, *amici* emphasize the practical importance of the decision on their ongoing forestry activities. But for the reasons set forth below, they also emphasize the broader disruption flowing from the type of belated review of long-established EPA rules that the Ninth Circuit's decision allows.

The basic principle that should control here is clear. If an agency tries to apply a rule in a manner not specified at the time of promulgation, that application should then be susceptible to challenge as inconsistent with the governing law. But if the scope of a rule was announced at the time of promulgation,

and left unchallenged, then affected parties should be able to continue to rely on that rule, as they have on the 1976 Silvicultural Rule and the 1990 Phase I regulations. The Ninth Circuit undercuts these fundamental understandings, threatening the imposition of new, unexpected obligations on *amici* and others potentially subject to the Clean Water Act.

INTRODUCTION AND SUMMARY

This case began as a citizen suit brought in a district court under 33 U.S.C. § 1365. The district court had little difficulty concluding that the challenged failure to obtain section 402 (33 U.S.C. § 1342) permits for sediment runoff from forest roads did not violate the CWA. The Silvicultural Rule, promulgated in 1976, made it clear that such runoff did not involve point source discharges and thus was beyond the reach of section 402 permitting requirements. *See* Pet. App. 53-77. In so holding, the district court followed a conventional approach, consistent with other courts, in concluding that under the Silvicultural Rule, forest road rainwater runoff is from a "non-point" source, and thus no permits were required. *See Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998); *Sierra Club v. Martin*, 71 F. Supp. 2d 1268 (N.D. Ga. 1996). Because the Silvicultural Rule itself made clear that such runoff was not subject to section 402 permitting, the district court concluded that it need not address the challenge to EPA's rules implementing Phase I of the 1987 CWA amendments, which also declined to subject such rainwater runoff to section 402 permitting requirements.

On appeal, however, this case took on a very different cast. The Ninth Circuit allowed this enforcement action, to which EPA was not a party, to become the vehicle for attacking EPA rules that had been in effect for decades. It then seemingly leap-frogged EPA's primary authority and responsibility to consider in the first instance, through continued rulemaking, whether stormwater runoff from forest roads used for logging gave rise to a need for section 402 permits under the 1987 CWA amendments.

In so doing, the Ninth Circuit created a device for bypassing jurisdictional requirements limiting challenges to EPA-promulgated rules. By statute, such challenges must be raised in a case against EPA in a court of appeals no more than 120 days after promulgation, unless the grounds for the challenge arose later. *See* 33 U.S.C. § 1369(b)(1). A claim that the rule's intended scope as described by EPA would render the rule inconsistent with the CWA is, of course, an issue that could have been raised in such a review action. If such a challenge could have been presented under §1369(b)(1), then the following subsection, 33 U.S.C. §1369(b)(2), makes it clear that the rule is truly final, and the claim cannot be pursued later by way of collateral attack in enforcement proceedings.

When EPA promulgated the two rules at issue in this case—the 1976 Silvicultural Rule and the 1990 Phase I regulations—it made clear how those rules were to apply to the issues raised in this case. Any affected party who believed that the rules as explained by EPA were inconsistent with the CWA could have challenged them at that time.

Nonetheless, under the Ninth Circuit's decision, there is now an alternative way of attacking long-standing rules as inconsistent with the CWA. That attack may be mounted decades after promulgation, even if the intended scope of the rule was clear at the time of promulgation and could have been timely challenged. Moreover, that attack can be pursued in a district court citizen suit to which EPA is not even a party. Even decades later, if the court concludes that the scope of the rule as described by the agency had been inconsistent with the CWA, the court can force a transformative interpretation upon the rule to now render it consistent with (the court's current understanding of) the CWA, but inconsistent with the agency's contemporaneously stated intent. Under that approach, the rule is, in theory, merely "interpreted." It survives as neutered, deprived of its intended contemporaneously described meaning. That approach, however, ignores the central question under 33 U.S.C. § 1369(b)(2), namely, whether the challenge to the scope of the rule as inconsistent with the CWA "could have been" maintained—and thus was required to have been maintained—at the time of promulgation.

The Ninth Circuit used that tack here. Based on the CWA's definition of "point source," the Ninth Circuit held that because ditching and culverts channel runoff from forest roads, the runoff requires section 402 permitting. It then applied that holding to overturn one of the core applications of EPA's Silvicultural Rule, which since the Act's earliest days defined runoff from forest roads as "non-point source" in nature, and thus not subject to section 402 permitting.

The Ninth Circuit then reviewed EPA's 1990 rulemaking in connection with Congress's effort to comprehensively address stormwater runoff with the 1987 CWA amendments. *See* 33 U.S.C. § 1342(p)(1)-(4). In 1990, EPA determined that channeled runoff from forest roads were not discharges "associated with industrial activity" and thus did not require permits under Phase I rulemaking implementing the 1987 amendments. It did so in part—but only in part—because the Silvicultural Rule already specified that discharges from such activities were not point source discharges. Indeed, EPA filed an amicus brief in this case noting that even if the Silvicultural Rule was not itself sufficient to clarify that logging road runoff is not "industrial activity," the preamble to the Phase I rulemaking explains that timber harvesting—silviculture—is not industrial activity. *See* U.S. 1st C.A. Amicus Br. 28-31.

But the Ninth Circuit nonetheless declared that runoff from forest roads used for logging must be deemed discharges "associated with industrial activity," preempting EPA's longstanding contrary position under its Phase I regulations. *See* Pet. App. 42-48. The Ninth Circuit relied on EPA's reference to facilities classified within Standard Industrial Classification ("SIC") 24 as being "associated with industrial activity." In so holding, it declined to recognize EPA's clarification, made at the time of promulgation and again as amicus in this case, that the Agency's reference to SIC 24 did not encompass "logging" and forest roads used for logging. And it paid no heed to EPA's stated view, in its district court amicus brief, that silviculture is more akin to agriculture than "industrial activity." *See* Pet. App. 124a n. 19. The

Ninth Circuit thus did not noticeably defer to EPA's interpretation of its Phase I regulations as required by this Court's precedents. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

But the error runs deeper. Even assuming that the Ninth Circuit's narrowing of the Silvicultural Rule now opened the door to reexamination of EPA's decision to exclude forest road runoff from Phase I regulation, that reexamination must be conducted first by EPA, as part of its rulemaking responsibility, and not the courts. But the Ninth Circuit did precisely that, again using an enforcement action to intrude on agency rulemaking.

The practical impact of the Ninth Circuit's ruling on forest road construction and maintenance is likely to be overwhelming. Forest roads of the type used for timber harvesting cover hundreds of thousands of miles, crossing "waters of the United States" in countless locations. They are built and maintained by private citizens and companies, counties and states, and the federal government. To ensure that they remain useful, the roads are constructed with appropriate ditching and culverts to channel precipitation runoff. And for the last 35 years, under the Silvicultural Rule and EPA's 1990 Phase I regulations, runoff from forest roads has not been subjected to the Act's section 402 permitting requirements. Yet according to the Ninth Circuit, all that has been wrong. We have set forth additional information about the practical impact of the decision on forest and farm owners in the *amici's* statement of interests and will not repeat it here. The ruling below casts a wide net over forestry.

The effects of the decision on administrative law and process are even wider for it allows belated challenges to longstanding EPA rules to be bootstrapped into enforcement actions to which the EPA is not even a party. It thus allows collateral challenges to rules that—because no timely challenge had been raised at the time of promulgation—had long taken on the force of established law. This Court should grant the petitions to resolve the important questions presented.

ARGUMENT

I. The Ninth Circuit's Failure To Respect The Prescribed Means For Challenging Agency Rules Makes This A Case Of Exceptional Importance.

Challenges to rules promulgated under the CWA must be initiated in a Circuit Court of Appeals of the United States within 120 days of the rule's promulgation unless "based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). Absent challenge, the rule becomes law. The prohibition on collateral challenges to EPA rules is emphatic: "Action of the Administrator with respect to which review could have been obtained under [§ 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2). The Ninth Circuit's rulings in this case flout this basic, jurisdictional limitation on judicial review of agency rules.

A. The Ninth Circuit Forced A Transformative Construction Upon The Silvicultural Rule To Render It Consistent With Its View Of The Requirements Of The Clean Water Act.

A foundational requirement of the CWA is that pollutant discharges from "point sources" are prohibited unless granted a permit under section 402. *See* 33 U.S.C. §§ 1311(a), 1342. More than 35 years ago, however, EPA promulgated the Silvicultural Rule (currently, 40 C.F.R. § 122.27). That rule specifies that permits are not required for silvicultural rainwater runoff, including runoff from the hundreds of thousands of miles of forest roads nationwide, because such runoff is "nonpoint source" in nature. Accordingly, private actors, states, counties and federal agencies were not required to obtain section 402 permits when they installed a culvert, deepened ditches, or extended or moved a forest road used for timber harvesting and similar silvicultural activities.

The Ninth Circuit's decision recollects the history of the Silvicultural Rule and its intended scope. *See* Pet. App. 20-32. EPA first tried to exempt categories of discharges, including any related to silviculture, from the CWA's permitting requirements. But upon the D.C. courts' determination that EPA could not simply exempt point source discharges from the Act, it issued the Silvicultural Rule. *See* 41 Fed. Reg. 24709 (June 18, 1976).[2] The Rule clarifies and lists the four silvicultural activities that EPA regarded as

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[2] EPA codified the current version of the Rule in 1980, but that version differs from the 1976 version only in minor respects. *See* 45 Fed. Reg. 33,290, 33,446-47 (May 19, 1980).

involving point sources: discharges through "discernible, confined, and discrete conveyance[s] related to rock crushing, gravel washing, log sorting, or log storage facilities." At the same time, EPA determined by rule that stormwater runoff from roads and road maintenance, including through ditches and culverts integral to forest road survival, was a nonpoint source discharge outside the permitting process. *See* Pet. App. 31-32.

Throughout most of its opinion, the Ninth Circuit correctly described the Silvicultural Rule as unambiguously defining stormwater runoff from forest roads as nonpoint sources, whether channeled through ditches and culverts or not. *See* Pet. App. 20-32. Relying on the text and EPA's explanatory statements in the preambles to the proposed rule, *see* 41 Fed. Reg. 6281 (Feb. 12, 1976), and the final rule, *see* 41 Fed. Reg. 24709 (June 18, 1976), the Ninth Circuit panel stated repeatedly that the Rule treated stormwater runoff from forest roads as nonpoint source, even if channeled. *See, e.g.*, Pet. App. 24 ("[A]ny natural runoff containing pollutants was not a point source, even if the runoff was channeled and controlled through a 'discernible, confined and discrete conveyance' and then discharged into navigable waters."); *id.* at 26 ("[T]he effect of the Rule was to treat all natural runoff as nonpoint pollution, even if channeled and discharged through a discernible, confined and discrete conveyance."); *id.* at 31 ("[D]ischarges of 'natural runoff' are nonpoint sources of pollution, even if such discharges are channeled and controlled through a 'discernible, confined and discrete conveyance.'").

Even if some ambiguity could be forced on the bare words of the Rule as written, its intended application to stormwater runoff through culverts and ditches—the issue here—was unequivocally set forth and ripe for challenge at the time of promulgation. The preamble to the proposed rule declared that "ditches, pipes and drains that serve only to channel, direct, and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program." *Id.* at 27. Responding to comments on the proposed rule, EPA emphasized that "[i]nsofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should also be considered nonpoint in nature." 41 Fed. Reg. at 24,711.

Such statements put all affected parties on notice that runoff from forest roads, even if channeled through ditches and culverts and the like, was not subject to permitting. If anyone believed the Rule was improper because ditches, pipes, and drains that channel runoff are, in fact, point sources that must be permitted under section 402, this was a challenge that "could have been" mounted under 33 U.S.C. § 1369(b)(1) within 120 days of the Rule's promulgation.

The Ninth Circuit nevertheless found itself unconstrained by the jurisdictional bar of § 1369(b). The Ninth Circuit first concluded that the Rule, as originally intended by EPA, would be inconsistent with the Act. *See* Pet. App. 36-37. Having so concluded, it forced an alternative interpretation on the Rule—contrary to its contemporaneously described scope—to conform it to the Act. Thus, the Ninth Circuit miraculously read the Rule as applying only to stormwater runoff from forest roads in the rare

circumstance where no channeling of the runoff through ditches and culverts occurs. Of course, without ditches and culverts to carry away the forest stormwater, the stormwater would wash away the forest roads.

By converting arguments about whether the Rule is consistent with the CWA—which should have been raised upon promulgation—into a mechanism for belatedly giving the Rule a transformative reinterpretation, the Ninth Circuit's approach to 33 U.S.C. § 1369(b) renders its jurisdictional bar ineffectual. If EPA has described the scope of a rule at the time of promulgation, then that is the time to object to that scope as being inconsistent with the CWA. It is no longer subject to challenge in an enforcement proceeding. The decisive jurisdictional question is whether the claim could have been brought at the time of promulgation. 33 U.S.C. § 1369(b)(2).

The controlling principle was explained by the United States in its second amicus brief to the Ninth Circuit: "If EPA states its interpretation at the time it promulgates the regulation (e.g., in an accompanying Federal Register preamble), a potential plaintiff must accept EPA's interpretation as authoritative and challenge the regulation directly and in a timely fashion . . . . Otherwise, Section 1369(b)'s purposes would be completely subverted by allowing a court to reject EPA's interpretation in a later citizen suit." U.S. 2d C.A. Amicus Br. 9. The issue is not whether the Rule is ambiguous in the eyes of one reading the Rule today, but whether an affected party could have mounted the challenge in a court of appeals against EPA within 120 days of promulgation. 33 U.S.C. § 1369(b)(2).

The Ninth Circuit supported its tack here by citing a statement in a footnote in an amicus brief of the United States[3] suggesting that the first time EPA had interpreted the Silvicultural Rule as defining forest road runoff through ditches and culverts as nonpoint source was in a brief filed earlier in this very case. According to the Ninth Circuit, this brought the issue within § 1369(b)(1)'s exception for suits challenging a rule based on grounds arising more than 120 days after promulgation. *See* Pet. App. 9-10. But the Ninth Circuit's explanation is transparently incorrect. The notion that this interpretation was new was inconsistent with EPA's statements at the time of promulgation. Even if correct, that would only overcome the time bar in the second sentence of § 1369(b)(1). It would not explain how the challenge could be mounted through a district court citizen suit, rather than in an appropriate court of appeals.

In 1976, when EPA promulgated the Silvicultural Rule, no affected party claimed that the Rule's prescribed scope exceeded EPA's power under the CWA, though such a challenge, if it had merit, would have been ripe to be raised. Consequently, for over three decades, discharges of the type in question here were deemed nonpoint source discharges, not subject to permitting. The Ninth Circuit, therefore, should

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[3] That footnote, in a brief to which EPA was not a party, is difficult to reconcile with EPA's contemporaneous description of the Silvicultural Rule. The footnote was in the same amicus brief in which the United States stated clearly that a statement of the rule's scope in the preamble triggers the obligation to mount a challenge to that stated scope within 120 days. *See* Pet. App. 9-10.

have either rejected the suit as an untimely collateral attack on the Rule, or followed the lead of the district court and other federal courts in similar litigation, by applying the Rule and dismissing the claim on the merits. *See* Pet. App. 53-77; *Newton Cnty. Wildlife Ass'n*, 141 F.3d 803; *Sierra Club*, 71 F. Supp. 2d 1268.

B. The Ninth Circuit Further Allowed This Enforcement Action To Displace EPA's Rulemaking Authority With Respect To The 1987 Stormwater Amendments.

The Ninth Circuit went equally far afield in addressing whether forest roads used for logging are "industrial activity" subject to permitting under Phase I of the 1987 CWA amendments. Although EPA's amicus brief made clear that EPA regarded channeled runoff from logging roads to be beyond the scope of Phase I regulations, *see* U.S. 1st C.A. Amicus Br. 28-31, the Ninth Circuit refused to defer to EPA's views on the proper scope of its Phase I regulations, though deference was required under this Court's precedents. *See Chase Bank USA v. McCoy*, 131 S. Ct. 871, 880 (2011) ("[W]e defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'") (quoting *Auer*, 519 U.S. at 461-62). Even if the Ninth Circuit's reinterpretation of the Silvicultural Rule in this case called into question EPA's 1990 determination that logging road runoff is outside the scope of Phase I regulation, the Ninth Circuit should have stayed its hand to allow EPA to reexamine whether such runoff

was nonetheless non-industrial and thus remained beyond the scope of Phase I regulation.

That this issue is one for agency determination, rather than judicial edict, is clear from the regulatory history. As the Ninth Circuit recounted, EPA had long been reluctant to regulate channeled stormwater runoff, citing among other things the sheer scope of such an effort. In 1987, Congress amended 33 U.S.C. § 1342(p) to address stormwater under a comprehensive new regime. It directed EPA to erect a permitting program for stormwater discharges in two phases. As part of Phase I, Congress directed EPA to require permits for five categories of stormwater discharges, including those "associated with industrial activity." *See* 33 U.S.C. § 1342(p)(1)-(3). EPA promulgated its Phase I regulations in 1990. *See* 55 Fed. Reg. 47,990 (Nov. 16, 1990). Congress required EPA to consider, in Phase II, whether other types of stormwater discharges should also be subject to permitting, given "the nature and extent of pollutants in such discharges." *See id.* § 1342(p)(5)-(6).

In its 1990 Phase I regulations, EPA defined discharges "associated with industrial activity" to refer only to discharges "directly related to manufacturing, processing or raw materials storage areas at an industrial plant." *See* 55 Fed. Reg. at 48,011. Runoff from a rural road running through the forest and used to haul timber does not reasonably fit within this definition. Moreover, EPA stated that its Phase I permit requirement would "not include discharges from facilities or activities excluded from the [permitting] program under this Part 122." *See* 40 C.F.R. § 122.26(b)(14); *see also* 55 Fed. Reg. at 48,011. Thus, EPA specifically carried forward into the Phase I

regulations the understanding that runoff historically outside section 402 permitting obligations pursuant to the Silvicultural Rule was not "industrial."

Further, EPA explained that by including a reference to Standard Industrial Code ("SIC") 24 in its regulatory definition of "associated with industrial activity," *see* 40 C.F.R. § 122.26(b)(14)(ii), it meant to require permits for "sawmills . . . and other mills engaged in producing lumber and wood basic materials" because such facilities could be expected to contain potential pollution sources such as "storing raw materials . . . [or] waste products . . . or chemicals outside." 55 Fed. Reg. at 48,008. But EPA specified that its reference to SIC 24 was not intended to include silvicultural activities in the forest itself, such as stormwater runoff from logging roads. *See* 55 Fed. Reg. at 48,011. It agreed with comments urging exclusion of logging road runoff from Phase I permitting, emphasizing that runoff is better controlled through best management practices. Thus, the "definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under [s]ection 402," such as natural runoff from forest roads, even if collected and discharged through ditches, culverts, and channels. *See id.*

EPA's decision that such activities are outside of Phase I could have been challenged at the time of promulgation. Notwithstanding timely challenges to other aspects of the Phase I regulations, EPA's decision on forest roads emerged unscathed. *See Am. Mining Cong. v. U.S. E.P.A.*, 965 F.2d 759 (9th Cir. 1992); *Natural Res. Def. Council v. U.S. E.P.A.*, 966 F.2d 1292 (9th Cir. 1992). Indeed, in 1999 EPA

declined to subject forest road runoff even to Phase II regulation, a conclusion that the Ninth Circuit later directed EPA to reconsider and which remains under consideration.[4] If EPA was properly directed to reconsider whether forest road runoff should be regulated under Phase II, that same activity could not have been mandatorily subject to Phase I regulation.

Nonetheless, more than a decade after the close of the 120-day filing window under 33 U.S.C. § 1369(b)(1), the Ninth Circuit here addressed whether forest road runoff was subject to Phase I regulation. Having held that the Silvicultural Rule does not permissibly define channeled forest road runoff as nonpoint source discharges (a holding that arguably displaced one of the reasons why EPA had found it beyond the scope of Phase I regulation), the Ninth Circuit decided to examine whether it was, in fact, subject to Phase I permitting. It noted that EPA had referenced SIC 24 in defining industrial activity, leading the Ninth Circuit to declare it "undisputed that

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[4] When EPA promulgated its Phase II regulations, it required permits for activities that "present a high likelihood of having adverse water quality impacts." *See* 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999). EPA did not subject channeled runoff from forest roads to permitting under Phase II. Timely challenges to EPA's Phase II regulations were filed in three courts of appeals and consolidated in the Ninth Circuit. *See Envtl. Def. Ctr. v. U.S. E.P.A.*, 344 F.3d 832, 843 (9th Cir. 2003). Among the many issues raised was whether EPA's decision not to subject forest road runoff to Phase II permitting was unlawful. *See id.* at 860-63. The Ninth Circuit remanded the issue to EPA on the theory that even if EPA had previously concluded that such activity was not subject to permitting, that did not mean that EPA should not now consider whether it should be, as part of Phase II. *See id.* at 863. *See* Pet. App. 48.

'logging,' which is covered under SIC 2411 (part of SIC 24), is an 'industrial activity.'" *See* Pet. App. 44-45. This analysis, however, bypassed EPA's own statements—made at the time of promulgation and in its first amicus brief to the Ninth Circuit—that by referencing SIC 24 in the regulation, EPA did not intend to encompass runoff from roads used for logging and did not view silvicultural activity as industrial. In deciding the issue, the Ninth Circuit thwarted Congress' bar on untimely CWA rulemaking challenges (and indeed, did not even discuss it), failed to defer to the agency and thwarted Congress' intent to allow EPA to decide how best to regulate stormwater discharges—including how to define discharges "associated with industrial activity."

Even if the Ninth Circuit's ruling on the proper scope of the Silvicultural Rule opened the door to rethinking EPA's earlier conclusion that forest road runoff is outside the scope of Phase I regulation, *i.e.*, it created grounds to challenge the Phase I regulations that were unavailable 120 days after promulgation, the Ninth Circuit had no warrant to determine whether such forest road construction and maintenance was, in fact, "industrial activity" subject to Phase I regulation. Whether such runoff is "associated with industrial activity" subject to Phase I regulation, whether it should be subject to Phase II regulation, or whether it should remain outside the permitting process entirely, are questions for EPA to resolve in the first instance. These questions are not properly resolved in an enforcement action to which EPA is not even a party.

Congress gave EPA broad discretion to determine both whether stormwater discharges are industrial and how best to regulate non-industrial stormwater discharges. *See* 33 U.S.C. § 1342(p). The Ninth Circuit's assertion that silviculture, which is akin to agriculture, is actually an "industrial activity," is far from obvious. *Cf.* Pet. App. 124a n. 19 ("Forestry roads and silvicultural harvesting . . . more closely resemble agricultural land uses than industrial ones."). The operative definition of "storm water discharge associated with industrial activity" applied by EPA in Phase I—referring to discharges from "industrial plants," 40 C.F.R. § 122.26(b)(14)—was not on its face broad enough to reach forest roads used for logging. As amicus in this case, EPA had clarified that even apart from the Silvicultural Rule, it did not believe that forest road maintenance could properly be considered industrial activity. U.S. 1st C.A. Amicus Br. 29-31; Pet. App. 123a-127a. Moreover, the determination that runoff from forest roads, channeled or not, ought not be subject to permitting, had been the agency's view for more than three decades, since promulgation of the Silvicultural Rule itself. Thus, EPA's conclusion that silviculture is more closely allied to agriculture than "industrial activity," is neither plainly erroneous nor inconsistent with the regulation. Quite the contrary, it is intuitively correct and consistent with the historical treatment of silviculture.

Nonetheless, the Ninth Circuit inexplicably ignored EPA's interpretation, holding that roads used to transport logged timber are "industrial," thus imposing its own view of what is industrial activity under the Phase I regulations. *See* Pet. App. 44-47.

Again, the Ninth Circuit lost sight of the fact that this was a citizen suit under 33 U.S.C. § 1365, not a challenge to EPA rulemaking under 33 U.S.C. § 1369, and that these were issues Congress assigned to EPA, not to the courts.

C. The Decision Below Undermines Congressional Limits On Judicial Review Under Various Statutes.

Even beyond the great practical impact of the Ninth Circuit's ruling on the timber industry, the Ninth Circuit's rulings on the judicial review of agency regulations in the context of an enforcement action are important. Many federal statutes limit judicial review of agency rules to suits against the agency in particular venues, subject to specific filing deadlines. *See, e.g.*, 42 U.S.C. § 7607(b) (Clean Air Act: 60 days); 30 U.S.C. § 1276(a)(1) (Surface Mining Control and Reclamation Act (SMCRA): 60 days); 42 U.S.C. § 300j-7(a) (Safe Drinking Water Act: 45 days); 42 U.S.C. § 300aa-32 (National Childhood Vaccine Injury Act: 60 days); 42 U.S.C. § 4915(a) (Noise Control Act: 90 days); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act: 90 days). Review provisions such as these are jurisdictional, and courts routinely reject untimely rulemaking challenges filed outside of the statutory review period. *See, e.g.*, *Natural Res. Def. Council v. U.S. E.P.A.*, 571 F.3d 1245, 1265, 1269 (D.C. Cir. 2009) (Clean Air Act); *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995) (SMCRA); *Chevron U.S.A., Inc. v. U.S. E.P.A.*, 908 F.2d 468, 471 (9th Cir. 1990) (CWA); *Tex. Mun. Power Agency v. Adm'r of U.S. E.P.A.*, 836 F.2d 1482, 1485 (5th Cir. 1988) (same); *W. Neb. Res. Council v.*

E.P.A., 793 F.2d 194, 198 (8th Cir. 1986) (Safe Drinking Water Act).

By limiting the time and circumstances under which rules may be challenged, Congress "struck a careful balance between the need for administrative finality and the need to provide for subsequent review in the event of unexpected difficulties." *Nat'l Mining Ass'n*, 70 F.3d at 1350; *see also Tex. Mun. Power Agency*, 836 F.2d at 1484 ("These time limitations impart finality to the administrative process, thus conserving administrative resources . . . . The requirements show a congressional decision to impose statutory finality on agency actions that we, as a court, may not second-guess[.]").

The Ninth Circuit's approach to 33 U.S.C. § 1369(b) allows for ready circumvention of statutory limits on judicial review in the CWA and other statutes with similar review provisions. Regulations that have been interpreted and applied consistently by agencies for decades, as announced at the time of promulgation, may nevertheless be challenged based on claims that the regulations were, all along, inconsistent with statutory authority. Indeed, that inconsistency can be used to drive a finding that the regulation is somehow ambiguous. Yet, it was clearly Congress's intent that all available challenges to rules be presented in an action against the agency near the time of promulgation. Any other result would effectively leave rules—here, a rule that has been consistently applied for more than three decades—perpetually open to judicial review as inconsistent with the governing statute.

The requirement that a rulemaking challenge be timely presented in a suit against the promulgating agency addresses more than finality. Such challenges must be mounted against the agency, which is thereby given a full and fair chance to defend its views. Such challenges, where the agency is the named defendant, allow for binding nationwide uniform determinations about the validity of agency rules. Moreover, other interested parties have the opportunity to contribute to the defense of (or the assault on) the rule. By contrast, collateral citizen suit attacks on agency regulations risk inconsistent and piecemeal litigation and determinations, and uncertainty as to effect of judicial decisions on the agency and non-parties.

Even apart from timing and venue requirements, the Ninth Circuit's decision to allow a citizen enforcement action to become the vehicle for issuing pronouncements that preempt an agency's authority to consider an issue plainly entrusted to its discretion is inconsistent with basic principles of administrative law, *see Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 740-41 (1996), and subverts the jurisdictional direction that rulemaking is to be reviewed in the courts of appeals through 33 U.S.C. § 1369(b). In this case of great practical importance, this Court should resolve the questions presented on the permissible scope of judicial review of agency rules in an enforcement action.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 11-338, 11-347

In The Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity; et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST LLC; et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, ASSOCIATION OF OREGON COUNTIES, IDAHO ASSOCIATION OF COUNTIES, ASSOCIATION OF O & C COUNTIES, AND, DOUGLAS COUNTY AS *AMICI CURIAE* SUPPORTING PETITIONERS

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The National Association of Counties, Association of Oregon Counties, Idaho Association of Counties, Association of O & C Counties, and Douglas County (collectively "Counties") respectfully submit this brief as *amici curiae* in support of Petitioners.[1]

INTERESTS OF *AMICI CURIAE*

The National Association of Counties ("NACo") is the national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,068 counties. NACo is a Delaware non-profit corporation, there are no subsidiary or parent organizations, and it has no shareholders.

The Association of Oregon Counties ("AOC") is an intergovernmental agency of county governments established under the laws of Oregon, it has no subsidiary or parent organizations, and it has no shareholders.

The Idaho Association of Counties ("IAC") is a non-profit, non-partisan service organization dedicated

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

to the improvement of county government. IAC was designed and incorporated by county elected officials under Idaho law and under Section 501(c)(4) of the Internal Revenue Code to provide services, research, uniformity, and coordination among member counties in order for the county elected officials to better serve their constituents. IAC has no subsidiary or parent organizations. Its members are the 44 Idaho Counties.

The Association of O & C Counties ("Association") is an unincorporated, voluntary association of the 18 counties in western Oregon that are the beneficiaries of the lands managed by the Bureau of Land Management under the O & C Act of 1937 (Act of Aug. 28, 1937, c. 876, Title I, §1) (43 U.S.C. §1181a, *et seq.*). The Association has no subsidiary or parent organizations and has no shareholders.

Douglas County is a county government established by the State of Oregon and as such has no subsidiary or parent organizations, nor any shareholders. Douglas County maintains a system of county roads over which the public has a right of use for forestry, industrial, recreational, domestic and general use.

The Counties have a vital interest in the definitive resolution of the question whether the runoff from that subset of their public roads that are logging roads not directly associated with any industrial facility are subject to the permitting requirements of the National Pollution Discharge Elimination System

("NPDES") of the Clean Water Act ("CWA") (33 U.S.C. §1342).

Pursuant to this Court's Rule 37.2(a), counsel of record in this case received timely notice of the Counties' intent to file this brief, and all parties consented to the filing of this brief with the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the far-reaching decision by the Ninth Circuit displacing the longstanding manner in which the Environmental Protection Agency ("EPA") and the State of Oregon implement the stormwater control provisions of the CWA (33 U.S.C. §1342(p)).

In *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011), the Ninth Circuit shifted the management of stormwater runoff associated with logging roads from the nonpoint source control programs managed by the respective states to a system of permitting under the National Pollution Discharge Elimination System ("NPDES") (33 U.S.C. §1342).

This fundamental shift in the long-established stormwater management scheme, ignored that Congress has chosen to focus the CWA's NPDES permitting requirements on those discharges of pollutants from point sources and only a limited number of

stormwater discharges (33 U.S.C. §1342), rather than require permitting for discharges or runoff associated with activities such as silvicultural activities.

In accord with this focus, EPA's longstanding interpretation of the CWA stormwater provisions has been that that subgroup of stormwater discharges associated with silvicultural activities, including logging roads, was not subject to NPDES permitting, rather these discharges were to be controlled as part of the State's primary responsibility to prevent, reduce and eliminate pollution (33 U.S.C. §1251(b)), which in this case was through the respective state's nonpoint source control programs implemented under 33 U.S.C. §1329 and 33 U.S.C. §1288.

Recognizing that differences in climate and geography make nationwide uniformity in controlling nonpoint source pollution virtually impossible, Congress has traditionally depended on land use controls state or local in nature to control these discharges and runoff. (*Oregon Natural Desert Association, et al. v. United States Forest Service*, 550 F.3d 778, 785 (9th Cir. 2008)). Congress has opted to regulate these sources of runoff and discharge through the programs established in 33 U.S.C. §1329(b) and 33 U.S.C. §1288.

In accord with this policy, and in reliance on its EPA approved nonpoint management program (33 U.S.C. §1329), the State of Oregon promulgated administrative rules which established standards for the control of the nonpoint sources of pollution (Oregon

Administrative Rules 340-042-0025), including discharges and runoff associated with silvicultural practices (Oregon Administrative Rules 629, divisions 625; 635; 640; 645; 650; 655; 660). Specific to logging roads, the State of Oregon incorporated into its Forest Practice Rules a series of best management practices addressing logging road construction and maintenance (Oregon Administrative Rules 629-625-0000, *et seq.*).

Plaintiff challenged EPA's and the State of Oregon's long-standing interpretation by alleging that the State of Oregon as the owner, or as the operator, of two logging roads (Trask Road and Sams Down Road) was in violation of the CWA by allowing the discharge of stormwater runoff from these logging roads without first acquiring a NPDES permit.

Plaintiff contended that the stormwater runoff from these logging roads represents a "discharge associated with industrial activity" and as such the roads were automatically subject to the NPDES permitting requirements under 33 U.S.C. §1342(p)(2)(B). Plaintiff sought to shift the focus of the State of Oregon's approved nonpoint pollution control program to a NPDES permitting program.

The defendants and intervenor-defendants moved to dismiss the case based on EPA's silvicultural rule (40 C.F.R. §122.27) and stormwater rule (40 C.F.R. §122.26) whereby logging roads were excluded from CWA permitting requirements. EPA filed an *amicus* brief in support of the motion to dismiss, explaining

that stormwater runoff from logging roads was not the type of discharge Congress had directed be subject to permitting (United States *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, 3:06-cv-01270 filed Dec. 6, 2006, C.R. 44).

As EPA explained in its *amicus* brief, part of the 1987 amendments to the CWA, Congress adopted a two-phase approach to management of stormwater discharges.

During the first phase, the CWA directed that five specific types of stormwater discharges were to be automatically subject to permitting ("Phase I") (33 U.S.C. §1342(p)(2) & (3)).

With respect to the other stormwater discharges, Congress directed that EPA, in consultation with the States, was to identify which of these other forms of stormwater discharges existed and were not regulated under Phase I (33 U.S.C. §1342(p)(2)). Once it identified these various discharges, it was then to identify which of these non-Phase I stormwater discharges should be subject to regulation. (33 U.S.C. §1342(p)(2) & (5)). The non-Phase I discharges that EPA determined were to be subject to permitting became known as the Phase II discharge. The remaining discharges were left to the States to manage.

In identifying the non-Phase I discharges pursuant to 33 U.S.C. §1342(p)(5), EPA had to first define and determine the scope of the ambiguous phrase "discharge associated with industrial activity." Defining this phrase was a critical step in fulfilling its

CWA obligations under 33 U.S.C. §1342(p)(5) & (6) to identify the non-Phase I discharges.

EPA defined the phrase "associated with industrial activity" as:

> "[s]torm water discharge associated within industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is **directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.**"

(40 C.F.R. §122.26(b)(14)) (*emphasis added*).

EPA established a three part test which required there be: first, a direct relationship between the road and the industrial activity; secondly, that the activity be one of the specific activities identified; and, third, that the discharge occur at a specific industrial plant or facility. Neither the Trask Road nor the Sams Down Road met any of these elements.

Further, EPA also interpreted the phrase as not including activities that were excluded from NPDES permitting pursuant to 40 C.F.R. §122. Included within Part 122, were the road related activities described in the silvicultural rule.

As part of its delegated authority to interpret the CWA, EPA established the silvicultural rule as a means of distinguishing which silvicultural activities

were to be "silvicultural point sources" and subject to permitting (40 C.F.R. §122.27), from those "silvicultural nonpoint sources" which were subject to state management.

EPA defined the "silvicultural point sources" as:

> "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States."

(40 C.F.R. §122.27(b)(1)).

EPA specifically referenced that the logging roads were nonpoint sources in that the term silvicultural point sources:

> "does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff."

(40 C.F.R. §122.27(b)(1)).

In its *amicus* brief to the Ninth Circuit, the United States again pointed out that the silvicultural nonpoint sources were to be controlled through the respective states' nonpoint source management

programs (33 U.S.C. §1329) rather than the NPDES permitting program (United States *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. Filed Nov. 15, 2007) C.R. 42).

In rejecting EPA's interpretation, the Ninth Circuit concluded that EPA's rules were invalid to the extent they served to exclude logging road stormwater discharges from the NPDES permitting requirements – a decision that gave inadequate deference to EPA's interpretation of the CWA provisions relating to "associated with industrial activity."

The Ninth Circuit ignored that Congress expressly meant for EPA to have substantial discretion in administering the CWA, entrusting EPA with discretion in defining specific terms (*National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 166-67, 171-75 (C.A.D.C. 1982)). Included within this discretion was the authority to define which stormwater discharges were associated with industrial activities.

Notwithstanding that EPA's interpretation of the phrase "discharge associated with industrial activity" was reasonable, and one EPA was required to make in order to fulfill its obligations under 33 U.S.C. §1342(p)(5), the Ninth Circuit simply reached another conclusion, namely that the EPA's interpretation was not consistent with the Congressional intent. The Ninth Circuit ignored that when, as in this situation, Congress has delegated to the agency the authority to implement a statute and the agency has interpreted provisions thereof through rulemaking, the court

should not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency (*Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984)).

Rather than defer to EPA's interpretation of the CWA, the Ninth Circuit concluded that a logging road is associated with an industrial activity and therefore any stormwater discharge along the logging road represented a "discharge associated with an industrial activity." It failed to recognize EPA's reasonable interpretation that activities covered by the silvicultural rule were not "discharges associated with an industrial activity."

The Ninth Circuit erred not only in rejecting the silvicultural rule, it also erred in failing to defer to EPA's long-standing interpretation of the phrase "associated with industrial activity." Rather than recognize EPA's interpretation of what discharges were subject to Phase I, the Ninth Circuit simply substituted its judgment and cast aside EPA's interpretation that stormwater discharges from logging operations were excluded from permitting.

The Ninth Circuit also ignored that under EPA's interpretation, the discharge must be not only from a conveyance that is used to collect and convey stormwater, it must also be "***directly related*** to manufacturing, processing or raw materials storage areas ***at an industrial plant***." (40 C.F.R. §122.26(b)(14)) (*emphasis added*).

The decision that these two remote logging roads, of which at least one is owned by a local government, are exclusively or primarily dedicated for use by an industrial facility has swept into the NPDES permitting process (33 U.S.C. §1342) not only private roads that were excluded under the silvicultural rule, but also large numbers of public roads owned and managed by the various counties.

The Petitioners have set forth in their respective briefs compelling legal reasons for granting *certiorari* with respect to the Ninth Circuit's departure from the EPA's and the State of Oregon's long-standing interpretations of the stormwater provisions of the CWA. The Counties will not restate these arguments, rather, the Counties instead explain why redefining roads utilized primarily for forestry purposes as roads associated with an industrial activity is overly broad and imposes a significant burden on the Counties.

In setting aside the long-established method of addressing stormwater discharges from silvicultural practices, the Ninth Circuit imposed a significant cost prohibitive burden on the Counties. As discussed *supra,* the financial burden to the Oregon Counties alone in meeting this new permitting burden cost is estimated to be $56,000,000 at a conservative minimum. The Counties can only meet this burden if they divert funding from other essential services to meet this new permitting requirement.

The Ninth Circuit erred in failing to defer to EPA's and the State of Oregon's long-standing interpretation of the CWA relative to management of stormwater discharges from logging roads. As a result of this error, the Ninth Circuit has upset the established CWA management programs and imposed a substantial burden on otherwise financially strapped counties.

ARGUMENT

The Ninth Circuit's decision is extremely broad reaching and will result in unwarranted burdens on the Counties.

The Ninth Circuit's decision that NPDES permits are required for the ditches and culverts associated with roads that are primarily logging roads has far-reaching implications on the Counties.

While the Ninth Circuit appears to have assumed that these primarily logging roads are built and maintained solely by the logging companies or by the operators of an industrial facility (*See Northwest Environmental Defense Center v. Brown* at p. 1084), this assumption is clearly in error. If the Ninth Circuit had had the benefit of public review and comment of the rule making procedures of the Administrative Procedures Act, it would have found that large numbers of the logging roads in Oregon – if not the majority – that fall within the Ninth Circuit's definition of "primary logging roads" are owned,

built and maintained by the Oregon Counties, the State of Oregon, United States Forest Service or the United States Bureau of Land Management.

Similarly, throughout the United States the various counties own and maintain a large number of roads that also fall within the Ninth Circuit's classification of primarily logging roads as roads that provide access to logging sites (*id.* at p. 1084).

Review is warranted by this Court in that the Ninth Circuit's holding that stormwater runoff from primarily logging roads qualifies as Phase I discharge has established a new and unprecedented burden requiring NPDES permitting for County roads that are used for logging purposes. This drastic shift in the manner in which the CWA is implemented alone warrants this Court's review.

Further, review is also warranted because the Ninth Circuit's holding has created the potential for local governments to be subject to CWA liability when their road systems are utilized by private or other public entities in exercising their rights to utilize the county road systems.

If the Ninth Circuit opinion is left in place, County, State and Federal officials will be inundated with an enormous workload in order to obtain NPDES permits for ditches and culverts which have insignificant environmental impacts.

The practical effect of the requirement to impose permitting requirements on logging roads would

impose an extensive and cost prohibitive permitting and monitoring requirement upon the Counties and other private parties – a burden they can ill afford without sacrificing funding for other essential services.

To illustrate the magnitude of the problem created by the Ninth Circuit's decision, the Association of Oregon Counties surveyed the various County Road Supervisors in Oregon to determine the number of County roads that would be defined as "primarily logging roads" as that phrase was used in the Ninth Circuit's decision. (Association of Oregon Counties, *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)).

The County Road Supervisors identified that the county road systems within Oregon contain approximately 4,800 miles of roads that fall within what the Ninth Circuit defined as "primarily logging roads." (Association of Oregon Counties, *et al.*; *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)).

Associated with these primary logging roads are approximately 20,000 cross culverts (culverts that cross under the primary logging road). Not included within this analysis are the culverts that do not cross under these "primary logging roads" but cross connecting side roads or private access driveways. (Association of Oregon Counties, *et al.*; *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)).

In addition to the "primary logging roads" identified by the County Road Supervisors, within the 2.1 million acres managed by the Bureau of Land Management ("BLM") the Association of O & C Counties also identified the number of roads and culverts. This analysis identified an additional 16,817 miles of "primary logging roads" along with 500 culverts that are larger than 80 inches in diameter and an additional 40,000 culverts of less than 80 inches in diameter. (Association of Oregon Counties, *et al.*; *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)).

The Oregon Department of Transportation in its 2009 Oregon Mileage Report also identified that there were 6,612 miles of "public" United States Forest Service roads which would mostly be logging roads. (ODOT 2009 Mileage Report, p. 163; at (http://www.oregon.gov/ODOT/TD/TDATA/rics/PublicRoadsInventory.shtml#Oregon_Mileage_Report.)

While a separate NPDES permitting system for the "primary logging roads" does not currently exist, the magnitude of the problem facing the Counties can be quantified if one assumes that the same application requirements as are currently required for stormwater discharges associated with industrial activity (*See* 40 C.F.R. §122.26(c)) will be imposed for these "primary logging roads."

Under 40 C.F.R. §122.26(c), each culvert and ditch that discharges stormwater will require a

NPDES permit application that includes at a minimum:

(a) a site map with topography, drainage structures, underground springs (40 C.F.R. §122.26(c)(1)(i)(A));

(b) an estimate of impervious surfaces and the total area drained by each outfall, along with a narrative of the past activities (40 C.F.R. §122.26(c)(1)(i)(B));

(c) certifications that each of the outfalls has been tested for non stormwater discharge (40 C.F.R. §122.26(c)(1)(i)(C));

(d) information regarding significant spills of toxic or hazardous pollutants at the facility (40 C.F.R. §122.26(c)(1)(i)(D)); and,

(e) sample data collected during storm events from each of the outfalls (40 C.F.R. §122.26(c)(1)(i)(E)).

The requirement of subpart (b) that the owner of the primary logging road provide a narrative on past activities that have occurred within the drainage standing alone imposes an impossible burden on the Counties since these past activities were often undertaken by adjacent landowners or operators. If the owner of the logging road is a county or other governmental entity, it is being placed in the position of collecting enormous amounts of data from the landowners or operators adjacent to its county road system who have little incentive or requirement to provide this data.

Based upon the number of miles of "primary logging roads" identified by the various County Road Supervisors, the Association of Oregon Counties' road engineer estimated that to obtain permits for all of the cross culverts and roadway ditches associated with just the 4,800 miles of "primary logging roads" and their accompanying culverts under county jurisdiction, there would be a permitting cost to the Oregon Counties of approximately $56,000,000 (20,000 culverts x 40 hours staff time per permit x $70 per hour = $56,000,000) (Association of Oregon Counties, *et al.*; *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266, C.R. 95 (9th Cir. Filed Oct. 15, 2010)). One can assume that the impact of the Ninth Circuit's ruling will be far greater once the "primary logging road" permitting requirement is applied to the forest counties in other states.

Not included within this $56,000,000 estimate is the required pre-application sampling of each outfall during a stormwater runoff event as required under 40 C.F.R. §122.26(c)(1)(i)(E) – a stormwater sampling program that will be a staggering burden in its own right.

The data collection provisions of 40 C.F.R. §122.26(c)(1)(i)(E) require:

> "[q]uantitative data based on samples ***collected during storm events*** and collected in accordance with 122.21 of this part ***from all outfalls*** containing a storm water discharge associated with industrial activity for the following parameters:

* * *

(3) Oil and grease, pH, BOD5, COD, TSS, total phosphorous, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

* * *

(5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation;

(6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours)."

(*emphasis added*).

As with the requirement under 40 C.F.R. §122.26(c)(1)(i)(B) to obtain data as to the land practices in the drainage area of each culvert or ditch, to obtain this storm event data for each culvert or ditch outfall along the 4,800 miles of "primary logging roads" as well as for the accompanying 20,000 cross culverts imposes a staggering burden on the Oregon Counties. Likewise, for the Federal agencies to obtain the data for the Bureau of Land Management's 16,817 miles of roads and the approximate 6,612 miles of Forest Service roads is an equally staggering financial burden.

Increasing the complexity of the issue is the unique checkerboard of intermingled private and public land ownerships in Oregon resulting from the reciprocal rights-of-way associated with the 1937 O&C Act lands managed by the Bureau of Land Management. Access across this checkerboard is provided through reciprocal right-of-way agreements that provide the United States and the private landowners with the right to use and construct logging roads on each other's property. (*See* 43 C.F.R. §2812 *et seq.*). As a result of these road agreements, numerous landowners have rights to use a road that they do not directly control, likewise they own roads to which other landowners have rights of use.

The "primary logging roads" covered by these reciprocal agreements are not under one single party's control and often involve numerous operators utilizing the same road concurrently. Contrary to the Ninth Circuit's assumption that the "primary logging roads" are built and maintained by the logging companies, such is not the case, for there are hundreds, perhaps thousands, of intermingled private owners within the O & C checkerboard, all of whom share the same interconnecting system of "primary logging roads." This interconnecting system of reciprocal rights of way are, in most cases, not associated either directly or indirectly with any specific industrial facility.

The Ninth Circuit has simply miscomprehended the nature of the road system that is utilized for silvicultural purposes. Rather than defer to the

established programs for controlling the stormwater discharges associated with silvicultural activities, the Ninth Circuit imposed an entirely new interpretation of the CWA – an interpretation that imposes a staggering burden on the Counties. This burden is not warranted given the existing programs to manage stormwater discharges and runoff. To meet this burden, the Counties will need to redirect funding from other essential services to fund this new and unwarranted permitting process.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be granted.

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October 2011

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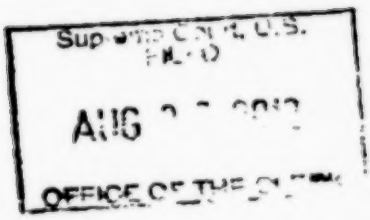

Nos. 11-338 and 11-347

In the Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, ET AL., PETITIONERS
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, RESPONDENT

GEORGIA-PACIFIC WEST, INC., ET AL., PETITIONERS
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITIONS FOR CERTIORARI FILED SEPTEMBER 13, 2011
CERTIORARI GRANTED JUNE 25, 2012

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. 06-1270-BR

Northwest Environmental Defense Center, Plaintiff,

v.

Doug Decker, Oregon State Forestor, in his official capacity, Jennifer Phillipi, John Blackwell, Sybill Ackerman, Peter Hayes, Calvin Mukumoto, Gary Springer, Steve Wilson, mebers of the Oregon Board of Forestry, in their official capacity, Hampton Tree Farms, Inc., Stimson Lumber Co., Georgia-Pacific West, Inc. and Swanson Group, Inc., Defendants

and

Oregon Forest Industries Council, American Forest and Paper Association, and Tillamook County, Intervenor-Defendants.

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	09/05/2006	Complaint pursuant to Section 505 of the Clean Water Act
7	09/22/2006	First Amended Complaint pursuant to Section 505 of the CWA

NO.	DATE	DESCRIPTION
16	11/03/2006	Motion to Dismiss by State of Oregon Defendants
17	11/03/2006	Memorandum in Support of Motion to Dismiss by State of Oregon Defendants
21	11/03/2006	Motion to Dismiss by Timber Defendants
22	11/03/2006	Memorandum in Support of Motion to Dismiss by Timber Defendants
23	11/03/2006	Industry defendants' and defendant-intervenors' request for judicial notice
44	12/06/2006	Amicus Curiae Brief of the United States
45	12/06/2006	Plaintiff's Memorandum in Opposition to Timber Defendants' Motion to Dismiss
46	12/06/2006	Plaintiff's Response to State of Oregon's Motion to Dismiss
47	12/06/2006	Plaintiff NEDC's request for judicial notice
50	12/21/2006	State defendants' request for judicial notice
51	12/22/2006	Reply Memorandum in Support of State of Oregon's Motion to Dismiss

NO.	DATE	DESCRIPTION
52	12/22/2006	Reply Memorandum in Support of Timber Defendants' Motion to Dismiss
53	01/10/2007	Plaintiff's Memorandum in Opposition to EPA's Amicus Curiae brief
54	01/10/2007	Plaintiff NEDC's second request for judicial notice
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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-35266

Northwest Environmental Defense Center, Plaintiff-Appellant,

v.

Marvin Brown, Oregon State Forestor, in his official capacity, Stephen Hobbs, Barbara Craig, Diane Snyder, Larry Giustina, William Heffernan, William Hutchison, Jennifer Phillipi, mebers of the Oregon Board of Forestry, in their official capacity, Hampton Tree Farms, Inc., Stimson Lumber Co., Georgia-Pacific West, Inc. and Swanson Group, Inc., Defendants-Appellees

and

Oregon Forest Industries Council, American Forest and Paper Association, and Tillamook County, Intervenor-Defendants-Appellees.

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
5	04/06/2007	Plaintiff-Appellant NEDC's statement of issues
23	09/17/2007	Plaintiff-Appellant's brief
24	09/17/2007	NEDC's motion for leave to file Riskedahl declaration

NO.	DATE	DESCRIPTION
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43	11/09/2007	Defendants-Appellees Timber Companies' brief
44	11/09/2007	Defendants-Appellees State of Oregon's brief
42	11/16/2007	Amicus Curiae brief of the United States
46	12/17/2007	Plaintiff-Appellant's reply brief
57	08/04/2008	NEDC's Fed. R. App. P. 28(j) notice of supplemental authority
58	08/07/2008	United States' response to NEDC's notice of supplemental authority
59	08/14/2008	Industry appellees' and intervenor-appellees' response to NEDC's notice of supplemental authority
64	10/31/2008	Order granting NRDC and EPIC motion for leave to file amicus brief

NO.	DATE	DESCRIPTION
68	11/19/2008	Argued and submitted to William A. Fletcher, Raymond C. Fisher, and Charles Breyer
69	11/24/2008	Intervenor-appellee AFPA's letter to court of appeals panel re: response to question at oral argument
73	08/17/2010	Filed Opinion: Reversed and Remanded
88	10/05/2010	Defendants-Appellees Timber Companies' Petition for Panel Rehearing and Rehearing En Banc
89	10/05/2010	Defendants-Appellees State of Oregon's Petition for Panel Rehearing and Rehearing En Banc
94	10/15/2010	Amicus Curiae American Forest Resource Council's brief
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98	10/15/2010	Amicus Curiae American Loggers Council's brief
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126	02/11/2011	Amicus Curiae brief of the United States
127	05/10/2011	Order granting Wildlands CPR and EPIC motion to file amicus brief and denying accompanying request for judicial notice
128	05/11/2011	Amicus Curiae CPR and EPIC brief
129	05/17/2011	Order and Opinion withdrawing and replacing prior opinion, denying petitions for rehearing and rehearing en banc

NO.	DATE	DESCRIPTION
131	06/02/2011	NEDC response to industry motion to stay the mandate
132	06/03/2011	Order denying motion to stay mandate
134	06/14/2011	Order denying motion to reconsider stay of mandate

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-35266

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Plaintiffs-Appellants,

v.

MARVIN BROWN, Oregon State Forester, in his official capacity; STEPHEN HOBBS, BARBARA CRAIG, DIANE SNYDER, LARRY GIUSTINA, CHRIS HEFFERNAN, WILLIAM HUTCHISON, AND JENNIFER PHILLIPPI, members of the Oregon Board of Forestry, in their official capacities; HAMPTON TREE FARMS, INC.; STIMSON LUMBER CO.; GEORGIA-PACIFIC WEST, INC.; and SWANSON GROUP, INC.,

Defendant-Appellees, and

OREGON FOREST INDUSTRIES COUNCIL; AMERICAN FOREST AND PAPER ASSOCIATION; and TILLAMOOK COUNTY, Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, Civ. No. 06-1270-KI

***AMICUS CURIAE* BRIEF OF THE UNITED STATES OF AMERICA**

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GLOSSARY

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Chevron	*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)
CWA	Clean Water Act
EDC	*Environmental Def. Ctr v. EPA*, 344 F.3d 832 (9th Cir. 2003)
EPA	Environmental Protection Agency
EPIC	*Environmental Protection Info. Center v. Pacific Lumber Co.*, 2003 WL 24550681 (N.D. Cal. 2003)
Forsgren	*League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002)
Hammersley	*Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res.*, 299 F.3d 1007 (9th Cir. 2002)
Large MS4	Municipal separate storm sewer system serving a population of 250,000 or more
Medium MS4	Municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000
MS4	Municipal separate storm sewer systems
NPDES	National Pollutant Discharge Elimination System
SIC code	Standard Industrial Classification Code

Small MS4	Municipal separate storm sewer systems serving under 100,000

Pursuant to Federal Rule of Appellate Procedure 29(a), the United States of America respectfully submits this brief as *amicus curiae*.

INTEREST OF THE UNITED STATES

Congress entrusted the United States Environmental Protection Agency ("EPA") to oversee the National Pollutant Discharge Elimination System ("NPDES") created by section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. EPA has a strong interest in this case because it involves the interpretation of the agency's NPDES regulations at 40 C.F.R. §§ 122.27 and 122.26. The United States thus files this brief as *amicus curiae* to explain that natural runoff from forest roads is not subject to the NPDES program under these regulations.

STATEMENT OF THE ISSUES

The issues presented in this appeal are: (1) whether EPA's silvicultural rule, found at 40 C.F.R. § 122.27, is properly read to define stormwater runoff associated with forest roads as "nonpoint sources," which do not require NPDES permits; and (2) assuming *arguendo* that there could be "point source" discharges associated with forest roads, whether EPA's definition of stormwater discharge "associated with industrial activity," found at 40 C.F.R. §122.26(b)(14), is properly read to exclude logging and forest roads, and thus does not subject stormwater associated with forest roads to the NPDES program?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The CWA is a comprehensive statute to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). CWA section 301(a) prohibits the "discharge of any

pollutant" by any person from a "point source" into waters of the United States, except in compliance with certain enumerated provisions, including section 402. *See* 33 U.S.C. §§ 1311(a), 1342. Section 502(12) defines the term "discharge of a pollutant" to mean any addition of any pollutant to a navigable water from any "point source," 33 U.S.C. § 1362(12). Section 502(14) defines the term "point source" as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure . . . from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). Sources of pollution that are not "point sources" are "nonpoint sources." *See Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 849 n.9 (9th Cir. 1987).

CWA section 402, enacted in 1972, created the NPDES program to regulate point source discharges. *See* 33 U.S.C. § 1342. In 1987 Congress added CWA section 402(p), which required EPA to establish a program to address certain point source discharges composed entirely of stormwater. *See* 33 U.S.C, § 1342(p). As explained in more detail below, stormwater point sources that are not covered by EPA's stormwater rules are not subject to the NPDES program.

Unlike point sources, nonpoint sources are not (and never were) regulated under section 402, but are addressed through other programs. For example, section 208 creates an "areawide waste treatment management" program to address "areas with substantial water quality control problems[.]" 33 U.S.C.

§ 1288(a). The section 208 program authorizes EPA to "identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution" within such areas. 33 U.S.C. § 1288(b)(2)(F). Section 304(f) requires EPA to issue "(1) guidelines for identifying and evaluating ... nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—(A) agricultural and silvicultural activities, including runoff from fields and crops and forest lands. . . ." 33 U.S.C. § 1314(f). Section 319 authorizes a federal grant program to address nonpoint sources. *See* 33 U.S.C. § 1329.

1. EPA's Silvicultural Rule

In 1973 EPA promulgated a rule exempting silvicultural point source discharges of stormwater from the NPDES program. 38 Fed. Reg. 18,000, 18,004 (July 5, 1973) (codified at 40 C.F.R. § 125.4(f)). The District Court for the District of Columbia overturned this rule in 1975. *See NRDC v. Train*, 396 F. Supp. 1393, 1395 (D. D.C. 1975). In upholding that decision, the court of appeals explained that, if a source is defined as a point source, it is illegal unless authorized by permit.[1] *See NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The court acknowledged, however, that EPA has authority to exclude some sources from the definition of "point source" by interpretation. *Id.* at 1378.

In 1976 EPA adopted a rule defining four categories of silvicultural activities as point sources. In this rule, EPA also explained that silvicultural nonpoint sources include "road construction and maintenance

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[1] This decision reflected the CWA before Congress added section 402(p) in 1987.

from which runoff results from precipitation events." 40 C.F.R. §125.54 (1976). In 1980 EPA slightly amended the silvicultural rule, which still defines only four categories of silvicultural point sources, to read as follows:

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include non-point source silvicultural activities such as . . . harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.*

40 C.F.R. § 122.27(b) (emphasis added). EPA has consistently interpreted this rule to define all precipitation-driven runoff from the listed nonpoint sources as not subject to the NPDES program.

In proposing the rule in 1976, EPA explained that most pollution related to silvicultural activities is "basically runoff induced by precipitation events and is not and should not be subject to the [NPDES program]." 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976). In 1995 EPA further explained that the silvicultural rule's exclusion of runoff from harvesting operations includes "initial transport of forest products from an active harvest site." 60 Fed. Reg. 50,804, 50,835 (Sept. 29, 1995).

In 1999 EPA reiterated this interpretation of the silvicultural rule when it sought public comment on a proposal to modify the rule to allow for case-by-case regulation of silvicultural stormwater sources as

point sources where appropriate. In proposing this amendment, EPA explained that runoff from the listed nonpoint source activities in the current rule is "*categorically excluded* from the NPDES program." 64 Fed. Reg. 46058, 46077 (Aug. 23, 1999) (emphasis added).[2]

2. CWA Section 402(p)

In 1987 Congress added CWA section 402(p), establishing a program to address stormwater point sources, including through the staged permitting of appropriate sources. *See* 33 U.S.C. § 1342(p). Sections 402(p)(1) and 402(p)(2) prohibited EPA from requiring NPDES permits for discharges "composed entirely of stormwater" until October 1, 1994, except for five categories of so-called "phase I" stormwater point sources. The five classes of "phase I" sources are: (1) discharges for which an NPDES permit had been issued before February 4, 1987; (2) discharges associated with industrial activity; (3) discharges from a municipal separate storm sewer system ("MS4") serving a population of 250,000 or more ("large MS4"); (4) discharges from an MS4 serving a population of 100,000 or more but less than 250,000 ("medium MS4"); and (5) a discharge which contributes to a violation of a water quality standard or is a significant contributor of pollutants. *See* 33 U.S.C. § 1342(p)(2). None of these categories include logging or forest roads. Section 402(p)(3) provided that NPDES permits are required for these phase I stormwater discharges, and section 402(p)(4) directed EPA to promulgate regulations governing them.

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[2] After considering public comments, EPA decided not to adopt this proposal. *See* 65 Fed. Reg. 43,586, 43,652 (July 13, 2000).

With respect to those stormwater discharges not included in phase I, section 402(p)(5) required EPA to conduct a study to identify these sources, and establish "procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality." 33 U.S.C. § 1342(p)(5)(B) & (C). Section 402(p)(6) then required EPA to designate the so-called "phase II" sources for regulation. 33 U.S.C. § 1342(p)(6).

In summary, section 402(p) establishes a two-phase permitting scheme for stormwater point source discharges and delegates to EPA the authority to promulgate rules to implement these requirements. Point source discharges composed entirely of stormwater from sources not designated for regulation under EPA's stormwater rules are not subject to the NPDES program. *See Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 328 (D. Vt. 2004), *aff'd*, 139 Fed. Appx. 338 (2d Cir. 2005).

3. EPA's Stormwater Rules

EPA adopted its phase I stormwater rule in 1990. This Court largely upheld the phase I rule. *See American Mining Congress v. EPA*, 965 F.2d 759 (9th Cir. 1992) ("*AMC*"); *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992). The rule includes an extensive definition of the term stormwater discharge "associated with industrial activity." *See* 55 Fed. Reg. 47,990 (Nov. 16, 1990). The definition references numerous Standard Industrial Classification codes ("SIC codes"), including SIC code 24, which includes the code for "logging" (SIC code 2411). *See* OMB, Standard Industrial Classification Code Manual, 107 (1987).

Despite the indirect reference to the SIC code for "logging," the definition states that it "does not in-

clude discharges from the facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). This reference includes EPA's silvicultural rule, which is contained in part 122. Thus, the reference to SIC code 2411 only covers silvicultural stormwater discharges from the four categories of facilities defined as point sources in the silvicultural rule described *supra*: rock crushing, gravel washing, log sorting and log storage facilities. To remove any doubt, EPA expressly explained in the preamble that: "EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking. Accordingly, the definition of 'storm water discharge associated with industrial activity' does not include sources that may be included under SIC 24, but which are excluded under 40 CFR 122.27." 55 Fed. Reg. at 48,011.

EPA adopted its phase II stormwater rule in 1999, designating two additional categories of stormwater discharges for regulation,[3] and retaining the authority to designate stormwater point sources for regulation on a case-by-case basis. *See* 64 Fed. Reg. 68,722 (Dec. 8, 1999). In *Environmental Def. Ctr. v. EPA*, 344 F.3d 832 (9th Cir. 2003) ("*EDC*"), this Court upheld EPA's phase II rule in most respects. As relevant here, this Court found that, in promulgating the phase II rule, EPA had not responded adequately to comments asserting that EPA should require NPDES permits for stormwater discharges from forest roads under section 402(p)(6).[4]

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[3] These two categories are: (1) certain small MS4s; and (2) construction sites disturbing one to five acres.

[4] The court also remanded "three aspects of the Rule concerning the issuance of notices of intent under the Rule's general permitting scheme." *EDC*, 344 F.3d at 840.

Id. at 861. This Court thus remanded the rule to EPA for a further explanation of its decision. Pursuant to this remand, EPA is currently assessing the options for addressing runoff from forest roads consistent with section 402(p)(5)-(6).

B. Procedural History

In the district court, Plaintiff Northwest Environmental Defense Center ("NEDC") filed a CWA citizen suit alleging that Oregon officials and private timber companies violated the CWA by discharging pollutants from "point sources" associated with two roads in the Tillamook State Forest without NPDES permits. (Complaint, NEDC ER 20-25, ¶¶ 83 to 92.) Defendants, supported by the United States as *amicus curiae*, moved to dismiss the complaint for failure to state a claim. The district court granted these motions and dismissed the action on March 1, 2007. (Judgment, NEDC ER 67, at 140.) The United States incorporates by reference the further discussion of the district court proceedings in the reply brief submitted by private industry defendants-appellees. Reply Br. of Hampton Tree Farms, Inc. et al. 5-9.

SUMMARY OF ARGUMENT

Under the CWA, all sources of water pollution are either "point sources" or "nonpoint sources." Nonpoint sources are not subject to the NPDES permitting requirements.

Stormwater runoff from forest roads is a nonpoint source under EPA's silvicultural rule. Courts have long recognized that Congress authorized EPA to distinguish between point and nonpoint sources. For over thirty years, EPA has exercised this authority to define "harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff"—i.e. runoff resulting

from precipitation events—as nonpoint sources. This rule categorically defines stormwater runoff from forest roads and harvesting activities as nonpoint sources. Stormwater runoff from these sources is not subject to the NPDES program even if it flows through a ditch, channel, or culvert. Thus the district court correctly held that runoff from these forest roads is a nonpoint source, which does not require an NPDES permit.

But even if this Court were to find that some forest road runoff might constitute a point source, any stormwater point source discharges from forest roads are not subject to NPDES permitting under CWA section 402(p) and EPA's stormwater rules. EPA's stormwater rules do not regulate logging or forest roads. In fact, the phase I stormwater rule expressly excludes from coverage all "facilities or activities excluded from the NPDES program" elsewhere within 40 C.F.R. part 122. This reference encompasses EPA's silvicultural rule, which is codified in part 122.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal for failure to state a claim. *See Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). Where Congress either implicitly or explicitly delegates authority to an agency to fill a gap left in a statute, the agency's construction is entitled to deference as long as it is a reasonable one. *See United States v. Mead Corp.*, 533 U.S. 218, 226-30 (2001) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("*Chevron*")). An agency's construction of its regulation is entitled to deference unless "plainly erroneous or inconsistent

with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

II. FOR OVER THIRTY YEARS, EPA'S SILVICULTURAL RULE HAS REASONABLY DEFINED PRECIPITATION-DRIVEN RUNOFF FROM FOREST ROADS AS A NONPOINT SOURCE.

NEDC argues that stormwater runoff from forest roads is a statutorily defined point source where that runoff flows through pipes, ditches, or channels. NEDC Br. 24-31. This argument both lacks merit and constitutes an improper challenge that cannot be brought in this action.

A. NEDC Cannot Challenge EPA's Longstanding Silvicultural Rule at this Time.

Although NEDC couches its challenge in terms of the CWA's definition of "point source," NEDC's appeal is actually an improper challenge to EPA's definition of silvicultural nonpoint sources in 40 C.F.R. § 122.27. NEDC, having not challenged the silvicultural rule within the time frame provided by the statute, cannot now challenge the rule some thirty years later. CWA section 509(b)(1)—and not the citizen suit provision at 505(a)—provides for challenges to final EPA actions, including promulgation of "any effluent limitation or other limitation under section 1311." 33 U.S.C. § 1369(b)(1). Moreover, section 509(b)(2) expressly provides that agency action reviewable under 509(b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2).

It is well established that section 509(b)(1) provides the exclusive mechanism for challenging EPA

rules excluding sources from the NPDES program. *See, EDC*, 344 F.3d at 843; *AMC*, 965 F.3d at 763, 767-68. Such challenges must be brought in the appropriate circuit court within 120 days of promulgation, "or after such date only if such application is based solely on grounds which arose after such 120th day." *Id.* NEDC's challenge to the silvicultural rule is decades too late. NEDC did not bring such a challenge to the silvicultural rule within the time frame provided by the CWA and may not do so now in this citizen enforcement action. EPA adopted the current version of the rule in 1980, *see* 45 Fed. Reg. 33,290, 33,446-47 (May 19, 1980), and NEDC's challenge, which argues that the rule is inconsistent with the statute's definition of the term "point source," is not based on grounds that have arisen since the expiration of the period during which the rule was subject to challenge. Thus, this Court should reject NEDC's attempt to resurrect a time-barred challenge in the context of this citizen suit. *See Chevron U.S.A., Inc. v. U.S. EPA*, 908 F.2d 468, 471 (9th Cir. 1990).

B. EPA's Silvicultural Rule is Entitled to Deference.

Should this Court nevertheless consider NEDC's improper and untimely challenge, this Court should defer to EPA's reasonable interpretation of the CWA to not require regulation of stormwater runoff from forest roads as point sources.

The two-step test set forth in *Chevron*, 467 U.S. 837, governs the review of an agency's interpretation of a statute in circumstances like these, where the agency interpretation is promulgated in an exercise of delegated authority. *See Mead Corp.*, 533 U.S. at 226-27. First, if "Congress has directly spoken to the precise question at issue," the agency must effectuate

Congress' express intent. *Chevron*, 467 U.S. at 842. Under step one of *Chevron*, the Court looks to the language of the statute, as well as its context, structure, legislative history, and purpose. *See Shays v. Federal Election Com'n*, 414 F.3d 76, 105 (D.C. Cir. 2005).

Second, if the statute is "silent or ambiguous with respect to the specific issue," the Court should defer to the agency's interpretation if it is reasonable. *Chevron*, 467 U.S. at 843. Under *Chevron* step two, an agency may "advance a legal argument in support of its administrative position which bolsters rather than duplicates the consistent position upon which its decision was made below." *See America's Community Bankers v. FDIC*, 200 F.3d 822, 836 (D.C. Cir. 2000).

In this case, the CWA's definition of the term point source, as well as its treatment of silvicultural sources, is sufficiently ambiguous to constitute an implicit delegation of authority to EPA under *Chevron* step two. *See Mead Corp.*, 533 U.S. at 227-229 (explaining concept of implicit delegation, and that the court is to defer to the agency unless its rule is "manifestly contrary to the statute") (citing *Chevron*, 467 U.S. at 842-43).

1. The CWA's Definition of the Term "Point Source" is Ambiguous.

The ambiguity in the CWA's definition of the term "point source" is, in large part, found in its over-breadth. The statutory definition includes "any pipe, ditch [or] channel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). But Congress could not have meant that all drainage that happens to flow through a pipe or ditch is always and inevitably subject to regulation as a statu-

torily-defined point source. For example, the definition should not be read so broadly as to encompass pollutants washed into a covered water by precipitation through rain gutters on a home, or through a ditch or pipe in a homeowner's backyard. Under NEDC's construction of the term point source, even hikers contributing to the erosion of sediment from footpaths in designated wilderness areas could be point sources. Such a *reductio ad absurdum* of the definition of the term "point source" cannot be what Congress intended. Thus, by virtue of its overbreadth, the point source definition is ambiguous. Furthermore, when the definition of point source is read in concert with CWA section 402(p), where Congress made it clear that EPA has tremendous discretion in determining what stormwater runoff will require an NPDES permit, this ambiguity is self-evident.

The ambiguity in the statutory definition is further underscored when the definition is read together with those CWA sections which specifically speak to silvicultural sources. As already noted, the CWA elsewhere refers to silvicultural activities as generating nonpoint sources. *See, e.g.*, 33 U.S.C. § 1288(b)(2)(F) (referring to "agriculturally and silviculturally related nonpoint sources of pollution"); 33 U.S.C. § 1314(f). Thus the definition of point source in section 502(14) is ambiguous.

Indeed, the circuit courts have also found that the statute is sufficiently ambiguous that EPA has authority to define the line between point and nonpoint sources. Most recently, in *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) ("*Forsgren*"), this Court noted that "EPA has some power to define point source and nonpoint source pollution *where there is room for reasonable interpreta-*

tion of the statutory definition." *Id.* at 1190 (emphasis in original). Likewise, the D.C. Circuit explained that the definition of point source, "including the concept of a 'discrete conveyance,' suggests that there is room here for some exclusion by interpretation." *NRDC v. Costle*, 568 F.2d at 1377.[5] Also, in *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the court deferred to EPA's decision not to require NPDES permits for discharges from dams. The court noted that Congress meant for EPA to have "at least some power" to define the term point source, *id.* at 167, and found that it could not conclude "that the Act requires EPA to adopt the strictest possible regulatory solution." *Id.* at 183. These cases all found ambiguity in the statutory definition of point source. Thus, should this Court entertain NEDC's argument that the silvicultural rule is inconsistent with the statutory definition,[6] the only question before this court is whether EPA's interpretation of the CWA to not require regulation of stormwater runoff from forest roads is reasonable.

2. EPA's Definition of Forest Roads as a Nonpoint Source is Reasonable.

EPA's definition of most silvicultural activities as generating only nonpoint sources is a reasonable construction of the CWA. Contemporaneous with its promulgation of the silvicultural rule, EPA explained

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[5] In the district court opinion upheld in *Costle*, the district court noted that the plaintiff did "not contend that every farm ditch, water bar, *or culvert on a logging road* is properly meant to be a point source under the Act." *NRDC v. Train*, 396 F. Supp. at 1401 (emphasis added).

[6] Of course, as noted *supra*, this challenge to EPA's silvicultural rule is untimely and improper in this litigation.

that the silvicultural sources EPA identified as non-point sources meet the following three criteria:

> (i) The pollutants discharged are induced by natural processes, including precipitation, seepage, percolation, and runoff; (ii) The pollutants discharged are not traceable to any discrete or identifiable facility; and (iii) The pollutants discharged are better controlled through the utilization of best management practices, including process and planning techniques.

41 Fed. Reg. 24,709, 24,710 (June 18, 1976). All three of these criteria apply to stormwater runoff from forest roads. First, runoff from these roads is induced by natural processes—namely, precipitation events. Second, forest roads are not discrete or identifiable facilities. In fact, the forest roads at issue in this case are public roads used largely for recreational purposes. Third, in adopting the silvicultural rule, EPA found that stormwater runoff from forest roads is best addressed by the states. *See* 41 Fed. Reg. at 24,710 ("EPA recognizes that numerous forest practices acts, State environmental programs, and local ordinances are excellent sources of effective regulation and does not intend to disrupt or supplant such regulation."); *see also* Oregon State Appellees' Br. 7-11 (discussing Oregon's regulation of forest roads).

Deference to EPA's reasonable reading of the statute is also appropriate here because EPA has "consistently followed" this interpretation of the CWA for over thirty years. *A&W Smelter and Refiners v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998); *McCoog v. Hegstrom*, 690 F.2d 1280, 1284 (9th Cir. 1982). As discussed *supra*, since 1976 EPA has consistently interpreted the silvicultural rule to categorically ex-

clude runoff from the listed categories of silvicultural nonpoint sources. While EPA considered changing course in 1999, the agency ultimately elected not to do so.

Moreover, deference to EPA in this case is consistent with this Court's decisions in other CWA cases. *See Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res.*, 299 F.3d 1007, 1018-1019 (9th Cir. 2002) ("*Hammersley*") (deferring to an EPA rule defining a mussel farm as a nonpoint source, and noting that a contrary determination would improperly "undermine the agency's interpretation of the Clean Water Act"); *see also San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 704-705 (9th. Cir. 2007) (deferring to the regulatory definition of the CWA term "waters of the United States").

Furthermore, although aware of EPA's regulatory definition for more than thirty years, Congress has not altered the CWA's regulation of silvicultural activities since EPA adopted the silvicultural rule in 1976. While Congress has amended the CWA to modify the regulation of other activities—including by adding section 402(p) addressing stormwater sources—it did not repeal the silvicultural rule. As the Supreme Court has explained, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000) (finding that "Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobac-

co"); *Bunker Hill Co. v. EPA*, 658 F.2d 1280, 1284 n.2 (9th Cir. 1981) (deferring to an EPA rule where Congress "made no effort to indicate any disagreement with EPA's construction" of the statute and did not "take advantage of an opportunity to alter it").

Here, if Congress had disagreed with EPA's interpretation, or had intended to take away EPA's discretion to elect not to regulate stormwater from forest roads, it would have said so in 1987 when it enacted section 402(p). Instead, when Congress enacted section 402(p) it did not include logging or forest roads within the five categories of phase I stormwater point sources that must be permitted under the NPDES program.

III. THE DISTRICT COURT CORRECTLY HELD THAT RUNOFF FROM FOREST ROADS IS A NONPOINT SOURCE.

A. The District Court Correctly Applied *Forsgren*.

Much of NEDC' s argument is predicated on its misreading of this Court's decision in *Forsgren*, 309 F.3d 1181. *See* NEDC Br. 25-28. As noted above, *Forsgren* held that the statutory definition of point source in CWA section 502(14) "clearly encompasses an aircraft . . . spraying pesticide . . . directly over covered waters."[7] 309 F.3d at 1185. In reaching this conclusion, the Court explained that "silvicultural pest control *from which there is natural runoff* would be an example of a 'nonpoint source silvicultural' ac-

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[7] In *Forsgren* this Court did not consider whether the pesticides were pollutants, because it assumed that the parties agreed that they were. *See* 309 F.3d at 1184 n.2. In fact the United States expressly reserved its argument on that issue in its brief to the district court.

tivity not included in the term 'point source.'" *Id.* Thus, under *Forsgren*, "natural runoff" from "construction and maintenance" of forest roads is likewise a nonpoint source.

NEDC nevertheless asks this Court to disregard the silvicultural rule, arguing that *Forsgren* rendered the statutory definition of the term point source "controlling" here. NEDC Br. 25-29. But *Forsgren* did not displace EPA's silvicultural rule. The *Forsgren* Court merely found that the rule's definition of nonpoint sources did not apply in the very different factual setting of pesticides discharged from an airplane directly over covered waters. The *Forsgren* Court read the phrase "from which there is natural runoff" to modify all the nonpoint source activities listed in the second sentence of the regulation. 309 F.3d at 1186. Having read the silvicultural rule's list of nonpoint sources to only reach various categories of "natural runoff," the Court inevitably proceeded to find that discharges of pesticides from an airplane are point sources. Such discharges are obviously not "natural runoff," but result from human action taken from a discrete facility—an airplane. Unlike in *Forsgren*, this case involves precipitation eroding sediment and washing it into waters—in other words, "natural runoff." Thus, the district court properly applied the silvicultural rule, as explicated in *Forsgren*, to the facts of this case.[8]

NEDC's argument that forest roads involve point sources is also inconsistent with multiple cases de-

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[8] NEDC also misreads the district court opinion to suggest that *Forsgren* created a "new test" for distinguishing point sources from nonpoint sources. *See* NEDC Br. 31-34. The district court did not apply a new test, but merely applied EPA's rules to the facts of this case. (Opinion, NEDC ER 66, at 129-134.)

cided by this Court noting that timber harvesting generates only nonpoint source pollution. For example, in *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002), this Court upheld a CWA study addressing sedimentation from silvicultural activities—which EPA considered to stem exclusively from nonpoint sources. This Court again recently noted that an example "of a non-discrete source is runoff from a farmland or timber harvesting." *Friends of Pinto Creek v. EPA*, — F.3d —, 2007 WL 2874335, *3 (9th Cir. 2007); *see also Oregon Natural Resources Council*, 834 F.2d at 849 (noting that the timber harvesting activities at issue were nonpoint sources); *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) (noting that "examples of nonpoint source pollution include . . . silvicultural activities").

B. Stormwater from Forest Roads is "Natural Runoff" Under EPA's Silvicultural Rule.

NEDC also argues that channeled conveyances from forest roads must be point sources because the term "natural runoff" in EPA's silvicultural rule does not include stormwater when it flows through "man-made" ditches, channels, and culverts. NEDC Br. 37-40. This reading conflicts with EPA's interpretation of its rule. It is EPA's interpretation of its rule—and not NEDC's—that is entitled to substantial deference. *See Auer*, 519 U.S. at 461.

EPA has consistently interpreted the term "natural runoff" as synonymous with all "runoff from precipitation events." In 1980 EPA replaced the language from its 1976 rule, "from which runoff results from precipitation events," with the shorthand "from which there is natural runoff" without comment. 45

Fed. Reg. 33,290, 33,447 (May 19, 1980). EPA's substitution of these terms did not substantively change the rule. *See generally*, *Maine v. Thiboutot*, 448 U.S. 1, 17 n.4 (1980) (noting that a proposed minor revision to a statute, without comment, provided "strong evidence that the revisers intended no substantive change"). EPA intended the term "natural runoff" to continue to encompass all runoff from precipitation events. Had EPA intended a more limited use of the term "natural runoff," the agency would have said so in the preamble.

Just as EPA's construction of the CWA is entitled to deference under *Chevron*, EPA's construction of its own rule is entitled to deference where it is neither "plainly erroneous" nor "inconsistent with the regulation." *Auer*, 519 U.S. at 461 (deferring to the Department of Labor's interpretation of its regulations as contained in an *amicus* brief); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512-13 (1994); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). This general rule of substantial deference is further reinforced where an agency applies its expertise to interpret complex regulations, such as those EPA has promulgated to administer the CWA. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 n.9 (1980) (stating that deference to an agency's interpretation of regulations is rooted in respect for agency expertise in the area).

NEDC nevertheless presents several incorrect arguments that the meaning of the term "natural runoff" in EPA's silvicultural rule only reaches diffuse sources of runoff. NEDC Br. 36-50. First, citing to this Court's recent decision in *Northern California River Watch v. Healdsburg*, 496 F.3d 993 (9th Cir. 2007), NEDC argues that this Court must construe

EPA's silvicultural rule narrowly to achieve the purposes of the CWA. NEDC Br. 23, 35 (citing *Healdsburg*, 496 F.3d at 1001). *Healdsburg*, however, addressed the extent of federal jurisdiction over "waters of the United States," not the extent to which stormwater sources are regulated under the NPDES program. Moreover, by adding CWA section 402(p), Congress left no doubt that EPA need not require all stormwater point sources to secure NPDES permits.

In another attempt to alter the meaning of the silvicultural rule, NEDC tries to redefine the term "runoff" to refer only to diffuse sources by stringing together dicta from several cases, including this Court's opinion in *EDC*. NEDC Br. 37-40. Thus, NEDC suggests that the term "runoff" does not apply to water that passes through a ditch or culvert. However, as illustrated by a proper reading of *EDC* itself, the term "runoff" is not inherently limited to stormwater that is in no way channelized. *See EDC*, 344 F.3d at 869 (referring to stormwater point sources that EPA chose to regulate as "runoff"). EPA has made it clear that the term "natural runoff" in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts.

The cases cited by NEDC that address mining activities, NEDC Br. 40-42, which purportedly support its distinction between "natural" runoff and runoff through "man-made" conveyances, are simply inapposite. Unlike silviculture, EPA expressly defines mining as "industrial activity" subject to the NPDES program. *See* 40 C.F.R. § 122.26(b)(14)(iii).

NEDC also draws an analogy between the natural runoff at issue here and small MS4s, some of which are regulated under EPA's phase II stormwa-

ter rule. NEDC Br. 48-50. However, ditches, channels, and culverts on forest roads are simply not regulated small MS4s under EPA's stormwater rules. *See, e.g.*, 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(16), 122.32.

Finally, NEDC wrongly relies on two district court cases. First, NEDC cites an unpublished opinion in *Environmental Protection Info. Ctr. v. Pacific Lumber Co.*, 2003 WL 25506817, *15 (N.D. Cal. 2003) ("*EPIC*") (finding that the statutory definition of point source encompasses ditches, culverts and channels associated with forest roads). It is our position, however, that *EPIC* was wrongly decided, and the district court agreed.[9] (Opinion, NEDC ER 66, at 134.) The *EPIC* court failed to defer to EPA's construction of its rule, in conflict with *Auer*, 519 U.S. at 461, and *Hammersley*, 299 F.3d at 1018-1019. *EPIC* also conflicts with this Court's analysis in *Forsgren* and runs contrary to this Court's assertions that runoff from timber harvesting is a nonpoint source. *See, e.g., Pronsolino*, 291 F.3d at 1126.

NEDC's reliance on *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assoc.*, 278 F. Supp. 2d 654, 681-683 (E.D. N.C. 2003) ("*Holly Ridge*"), is likewise misplaced. *See* NEDC Br. 47. The district court in *Holly Ridge* correctly found that a construction site disturbing more than five acres of land was an expressly-defined "industrial activity" under EPA's phase I stormwater rule that required a stormwater permit. 278 F. Supp. 2d at 679 (citing 40 C.F.R. § 122.26(b)(14)(x)). Thus, unlike in this case,

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[9] *EPIC* is stayed pending bankruptcy proceedings initiated by defendant. *EPIC*, 3:01-cv-2821 MHP (N.D. Cal. July 24, 2001). Thus, the United States has not had an opportunity to seek review of the district court's decision.

the defendants in *Holly Ridge* were discharging stormwater in direct violation of EPA regulations.

Moreover, *EPIC* and *Holly Ridge* are contradicted by persuasive authority that is directly on point. For example, in *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998), the Eighth Circuit found that EPA's silvicultural rule excluded runoff from logging and road construction activities. *Accord Sierra Club v. Martin*, 71 F. Supp. 2d 1268 (N.D. Ga. 1996); see also *O 'Aha'ino v. Galiher*, 28 F. Supp. 2d 1258, 1261-1262 (D. Haw. 1998) (rejecting claims that farm access roads should be subject to NPDES permitting, and finding "no substantial difference between the harm caused by forest roads and that caused by defendant's farm roads").

In summary, EPA has reasonably and consistently construed its silvicultural rule to define stormwater from forest roads as nonpoint sources. The district court's judgment that runoff from forest roads is a nonpoint source should be affirmed. This Court need go no further to affirm the district court.

IV. EPA'S PHASE I STORMWATER RULE DOES NOT INCLUDE STORMWATER DISCHARGES FROM FOREST ROADS.

Below NEDC asserted that, despite EPA's decision in the silvicultural rule that runoff from forest roads is a nonpoint source, EPA nonetheless defined stormwater runoff from forest roads as a point source discharge "associated with industrial activity" when it promulgated the phase I stormwater rule at 40 C.F.R. § 122.26(b)(14). The district court disposed of this argument without analysis under EPA's phase I stormwater rule, because it held that runoff from forest roads is a nonpoint source. (Opinion, NEDC ER 66, at 134.) NEDC does not brief this argument

on appeal, and asks this Court to remand this issue to the district court. NEDC Br. 8.

First, this Court need not reach this issue if it agrees with EPA's reasonable interpretation that runoff from forest roads is a nonpoint source as the district court held. But even if this Court were to find to the contrary—that some of the runoff associated with forest roads is a point source—NEDC's argument that the phase I stormwater rule applies to forest roads must fail. The only silvicultural stormwater sources subject to EPA's stormwater rule are the four expressly-defined point sources in the silvicultural rule: rock crushing, gravel washing, log sorting, and log storage facilities.

NEDC's position in the district court that forest roads involve discharges "associated with industrial activity" ignores the plain language of the rule and the clear intent of EPA in promulgating the rule. First, the second sentence of the regulatory definition states that this term "does not include discharges from the facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). As explained *supra*, the silvicultural rule is found in 40 C.F.R. part 122 and excludes runoff from forest roads from the NPDES program.[10]

NEDC likewise misconstrues EPA's reference to SIC code 24 in the phase I rule. EPA primarily referenced this SIC code to regulate traditional *industrial* sources such as sawmills. *See* 55 Fed. Reg. at

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[10] Even if this court were to find that EPA's silvicultural rule does not define ditches, channels and culverts associated with forest roads as a nonpoint source, EPA clearly articulated its intent to exclude these sources from the phase I stormwater rule.

48,008 (explaining in the preamble that establishments under SIC code 24 "are engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials"). By not excluding SIC code 2411 (the logging subcategory), EPA intended to reference only the four categories of silvicultural facilities it had already defined as point sources in 1976, in order to make clear that these facilities would continue to be subject to the NPDES requirements. These four categories are "rock crushing, gravel washing, log sorting, [and] log storage facilities." 40 C.F.R. § 122.27(b). SIC code 2411 includes "logs" and "saw logs"—categories which could be construed to encompass log sorting or log storage facilities. Thus, this reference to SIC code 24 ensured that the phase I stormwater rule would preserve the silvicultural rule's longstanding definition of silvicultural point and nonpoint sources.

In fact, in response to a comment raising the concern that the rule could be misread in the same way that NEDC misreads the rule, EPA explained in the preamble that: "EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking. Accordingly, the definition of 'storm water discharge associated with industrial activity' does not include sources that may be included under SIC 24, but which are excluded under 40 CFR 122.27." 55 Fed. Reg. at 48,011.

In addition, the first sentence of the definition of stormwater discharge "associated with industrial activity" limits the term to "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). As discussed above, EPA has not defined logging as an

industrial activity, nor are these forest roads "directly related" to "manufacturing, processing, or raw material storage areas at an industrial plant." *Id.* Not only are logging and timber hauling not industrial activities under this definition, but these public roads are also used for recreational and other purposes that are indisputably not "industrial" in nature.

Moreover, the procedural posture of EPA's phase II stormwater rule provides further support that the phase I rule does not cover forest roads. EPA adopted the phase II rule on December 8, 1999. *See* 64 Fed. Reg. 68,722. One question raised in direct challenge to the phase II rule was whether EPA should have exercised its discretion to regulate forest roads. In response to this argument, this Court in *EDC* remanded the rule to EPA to determine whether section 402(p)(6) "requires EPA to regulate forest roads." *EDC*, 344 F.3d at 863. If forest roads were already covered by the phase I stormwater rule, this remand of EPA's phase II rule would have been unnecessary, because forest road sources would have already been subject to the NPDES permitting requirements.

Finally, because this very question remains pending before EPA, it would be inappropriate for this Court to pre-judge EPA's conclusion regarding the *EDC* remand without the benefit of a final decision on the phase II rule supported by an administrative record. Thus, any challenge to EPA's discretion to chose not to regulate forest roads under the phase I stormwater rule is simply not ripe at this time. Meanwhile, any such challenge is also time-barred under CWA section 509(b). 33 U.S.C. § 1369(b). NEDC did not challenge EPA's phase I

stormwater rule in the statutory time frame and cannot now collaterally attack the rule.

CONCLUSION

For the forgoing reasons, this Court should affirm the district court's judgment dismissing this CWA citizen suit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35266
(Panel: William A. Fletcher, Raymond C. Fisher, Charles R. Breyer)

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Plaintiff-Appellant

v.

MARVIN BROWN, *et al.*,

Defendant-Appellees

and

OREGON FOREST INDUSTRIES COUNCIL, *et al.*,
Intervenor-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,
Civ. No. 06-1270-KI

AMICUS CURIAE BRIEF OF THE UNITED STATES RESPONDING TO THE COURT'S QUESTIONS OF OCTOBER 21, 2010

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STATEMENT OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 29(a), the United States of America respectfully submits this brief as *amicus curiae*, responding to the two questions posed by the Court in its October 21, 2010 order regarding jurisdictional provisions of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, and their applicability to the issues in this case.

Congress entrusted the United States Environmental Protection Agency ("EPA") with the responsibility of implementing the CWA. That responsibility includes promulgating regulations regarding the National Pollutant Discharge Elimination System ("NPDES") created by Section 402 of the CWA, 33 U.S.C. § 1342. The United States has an interest in the proper interpretation of the provisions of the CWA that provide for judicial review of specified agency actions. The United States also has an interest in the proper application of the citizen suit provision of the CWA, 33 U.S.C. § 1365, which is an important supplement to EPA's and the States' CWA enforcement authority.

SUMMARY

This case involves a CWA citizen suit brought by the Northwest Environmental Defense Center ("NEDC") against the Oregon State Forester and the Board of Forestry (the "State") as well as private companies engaged in logging operations (the "private defendants"), alleging that the defendants were facilitating discharges without a permit from two specific roads in the Tillamook State Forest, in violation of the CWA and applicable regulations. The district court dismissed the case, finding that discharges of stormwater from the forest roads at issue were excluded from CWA permitting requirements

by effect of EPA's interpretation of its silvicultural point source regulation at 40 C.F.R. § 122.27 ("Silvicultural Rule"). A panel of this Court reversed. *Northwest Envtl. Def. Ctr. v. Brown*, 617 F.3d 1176 (9th Cir. 2010). Recognizing that the Silvicultural Rule is open to at least two possible interpretations (i.e., that the rule is ambiguous), the panel concluded that under either reading, stormwater runoff from logging roads that has been collected by and then discharged from a system of man-made ditches, culverts, and channels—as NEDC alleges—is not exempt from the CWA's definition of point source. *Id.* at 1191.

The panel then considered whether, even if such discharges are from point sources within the meaning of the CWA, the discharges are nonetheless exempt because of the 1987 amendments to the CWA pertaining to stormwater pollution, 33 U.S.C. § 1342(p). The United States had argued in its previous brief to this panel that the first phase of regulations implementing the 1987 amendments exempted the silvicultural discharges at issue from NPDES permitting. *Amicus* Br. of the United States of America (Dkt. 42), at 28-32, Nov. 15, 2007. The panel disagreed, concluding that the statute precluded that interpretation of the regulations, and remanded to the district court for further proceedings consistent with its opinion. 617 F.3d at 1196, 1198.[1]

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[1] Although the United States filed *amicus* briefs at the district court and appellate court levels to provide its views to the Court on important matters of interpreting the CWA and associated regulatory provisions, the United States is not a party to this action. As such, any relief afforded to NEDC in this case must be limited to the parties and applicable only to the specified dis-

In considering the petitions for panel rehearing or rehearing en banc filed by the State and private defendants, the Court has posed two questions relating to jurisdictional provisions of the CWA:

1) Can a suit challenging EPA's interpretation of its regulations implementing the Clean Water Act's permitting requirements be brought under the Act's citizen suit provision, 33 U.S.C. § 1365(a)?

2) Must a suit challenging EPA's decision to exempt the discharge of a pollutant from the Clean Water Act's permitting requirements be brought under the Act's agency review provision, 33 U.S.C. § 1369(b)?

At issue here is whether a court has jurisdiction to entertain a citizen suit under Section 1365(a) where the claim is that EPA's interpretation of the regulation is plainly erroneous or contrary to the CWA. Where EPA promulgates an ambiguous regulation and (as here) subsequently offers an interpretation of that regulation in an *amicus* brief, that interpretation is entitled to a high level of deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Even so, where the reviewing court determines that the proffered interpretation is plainly erroneous or would bring the regulation into conflict with the plain terms of the CWA, Section 1369(b) does not bar the court in a citizen suit from rejecting the interpretation on that narrow ground if EPA's interpretation of the regulation has only been publically pronounced in an *amicus* brief filed after commencement of the lawsuit.

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charges before the Court, and cannot directly bind EPA, a non-party.

STATUTORY AND REGULATORY BACKGROUND

EPA's Silvicultural Rule, 40 C.F.R. § 122.27, requires that "silvicultural point sources" be subject to the CWA's NPDES permitting requirements. In its rule, EPA defined silvicultural point sources as "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States." *Id.* Expressly not included as "silvicultural point source[s]" are "non-point source silvicultural activities," including "... harvesting operations ... or road construction and maintenance from which there is natural runoff." *Id.*

In the 1987 amendments to the CWA under Section 1342(p), Congress established a two-phase permitting scheme for stormwater runoff. In 1990, EPA promulgated the Phase I regulations, which require NPDES permits for the most significant sources of stormwater pollution, including discharges "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B). *See* 40 C.F.R. § 122.26 (regulations implementing Phase I). Phase II stormwater regulations were adopted by EPA in 1999; these specified two additional categories of stormwater point source discharges for regulation pursuant to Section 1342(p) and also retained the authority to designate additional discharges for regulation. Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999). In 2003, this Court remanded to EPA a portion of its Phase II regulations to consider, *inter alia*, whether Section 1342(p) requires EPA to regulate stormwater discharges from forest

roads, *Environmental Defense Center v. EPA*, 344 F.3d 832, 863 (9th Cir. 2003), and that remand remains pending before the Agency. All sources of stormwater not covered by Phase I or II are exempt from the permitting requirements of the CWA. *Cf. Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 328 (D. Vt. 2004), *aff'd*, 139 Fed. Appx. 338 (2d Cir. 2005).

DISCUSSION

1. A Challenge to an EPA Regulation Must be Brought in the Appropriate Court of Appeals Through the Special Judicial-Review Mechanism Established by 33 U.S.C. 1369(b).

The CWA's citizen suit provision, 33 U.S.C. § 1365(a), allows private citizens to bring enforcement actions against any person who is alleged to be in violation of "an effluent standard or limitation" under the CWA, including actions against persons alleged to be illegally discharging a pollutant into waters of the United States without a NPDES permit. *See* 33 U.S.C. § 1365(f) (defining "effluent standard or limitation" for purposes of citizen suit provision). The CWA's special judicial-review mechanism in 33 U.S.C. § 1369(b) authorizes private parties to obtain court of appeals review of certain EPA actions, including promulgation of "any effluent limitation or other limitation under section 1311," or rules that regulate the underlying NPDES permit procedures, as soon as they are promulgated, without waiting for the regulations to be applied to any concrete factual settings. *See*, e.g., *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992). However, such a challenge must be brought within 120 days after the rule's promulgation, except where a challenge "is based solely on grounds which arose after such 120th day."

33 U.S.C. § 1369(b)(1). The statute expressly states that any EPA action "with respect to which review could have been obtained under [33 U.S.C. 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2).

Thus, a challenge to an EPA regulation may not be brought in a citizen suit, but must instead be brought in the appropriate court of appeals through the special judicial-review mechanism established by 33 U.S.C. § 1369(b). For purposes of the exclusive review provision in Section 1369(b), moreover, a suit may constitute a "challenge" to an EPA regulation even if the only tangible relief the plaintiff seeks is an order directing a private party to cease a particular type of discharge. If the plaintiff's request for relief against a private party logically depends on the proposition that an EPA regulation is invalid, the suit is an impermissible "challenge" to the regulation itself, even if the plaintiff does not seek a declaratory judgment that the regulation is invalid or the entry of relief against EPA itself.[2]

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[2] The exclusive review regime in 33 U.S.C. § 1369(b) offers potential benefits to citizen plaintiffs. For example, the provision benefits potential challengers by superseding ordinary rules of prudential ripeness that might otherwise bar prompt review of promulgated regulations. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). The tradeoff for that authorization of pre-enforcement review, however, is that such a challenge must be brought within the 120-day window if it is to be brought at all. The exclusive review provision also benefits the regulated public by allowing all challenges to the breadth and substance of CWA regulations to be brought and resolved in one forum at one time, thus providing clarity to regulated entities regarding their obligations and repose to longstanding regulations.

II. How Sections 1365 and 1369 Apply to EPA's Interpretation of an Ambiguous Regulation.

Within 120 days of its issuance, a person must challenge the validity of a regulation and any contemporaneous agency interpretation of such regulation (such as an interpretation offered in its preamble) that falls within 33 U.S.C. § 1369(b)'s exclusive review provision. A court, however, has jurisdiction to entertain under Section 1365(a) a citizen suit challenging EPA's *non*-contemporaneous interpretation of its own regulation advanced in an *amicus* brief where such a challenge does not call into question the validity of the regulation itself. Yet the challenger takes on a heavy burden. In resolving that citizen suit, the court must accord the agency's interpretation heightened deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), most recently applied by the Supreme Court in *Chase Bank USA, N.A. v. McCoy*, No. 09-329, 2011 WL 197641 (S. Ct. Jan. 24, 2011). *Auer* deference applies only where a regulation is ambiguous as to the question presented. *Id.*, at *7; *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000).[3] If the regulation is clear on its face, then the regulation itself obviously controls.[4]

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[3] In *Chase Bank*, the Supreme Court explained that deference is not warranted where the text of a regulation is unambiguous, as "a conflicting agency interpretation advanced in an *amicus*' brief will necessarily be plainly erroneous or inconsistent with the regulation in question." 2011 WL 197641, at *9 (internal quotations omitted). Moreover, "adopting the agency's contrary interpretation [of an unambiguous regulation] would permit the agency, under the guise of interpreting the regulation, to create *de facto* a new regulation." *Id.* (quoting *Christensen v. Harris Cnty.*, 529 U.S. at 588).

[4] If the regulation is *unambiguous* as to the question presented, and the court's construction is contrary to the plain text of the

Under the standard set forth in *Auer*, the court must defer to an agency's interpretation that is not "plainly erroneous or inconsistent with the regulation," *Chase Bank*, 2011 WL 197641, at *8, and is based on a permissible construction of the governing statute. *Christian v. City of Gladstone, Mo.*, 108 F.3d 929, 934 (8th Cir. 1997). That is, courts are appropriately reluctant to conclude that a federal agency's construction of its own rule is textually unsupportable. Nevertheless, if the agency's interpretation was not set forth contemporaneously with the rule but rather in an *amicus* brief filed after the challenged conduct took place, Section 1369(b) does not prevent a plaintiff from asserting the invalidity of the agency's interpretation in the course of a citizen suit brought under 33 U.S.C. § 1365(a).

At issue here is whether a court in a citizen suit may reject EPA's textually-reasonable interpretation of its own ambiguous regulation based on the court's view that the interpretation is contrary to the definition of "point source" contained in the CWA. The answer to that depends on when EPA's interpretation is announced. If EPA states its interpretation at the time it promulgates the regulation (e.g., in an accompanying Federal Register preamble), a potential plaintiff must accept EPA's interpretation as authoritative and challenge the regulation directly and in a timely fashion in the court of appeals pursuant to 33 U.S.C. § 1369(b). Otherwise, Section 1369(b)'s purposes would be completely subverted by allowing a

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regulation, that construction would constitute an implicit invalidation of that regulation, which is improper. *Cf. Envtl. Def. v. Duke Energy*, 549 U.S. 561, 573, 581 (2007) (recognizing the fine line between a court's reading of a regulation to align it with the court's view of the statute, and a determination that the regulation, *as written*, is invalid).

court to reject EPA's interpretation in a later citizen suit. For purposes of 33 U.S.C. § 1369(b)'s exclusive review provision, a later challenge to EPA's contemporaneous interpretation of its own regulation, if based on the view that the regulation as so construed would be contrary to the statute, is an untimely de facto challenge to the regulation itself.

The situation is significantly different where, as here, the court holds that the pertinent EPA interpretation is offered well after the regulation is promulgated.[5] To be sure, courts must give due deference under *Auer* to an agency interpretation of its own regulation, even one that is first offered in an amicus brief and even though such an interpretation postdates the promulgation of the rule. *See Chase Bank*,

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[5] In its briefing to this Court, in places, NEDC appeared to attack the Silvicultural Rule based upon its applicability to forest roads generally. This sort of challenge should have been brought within 120 days pursuant to Section 1369(b). That is why the United States argued in its previous Court of Appeals *amicus* brief that "NEDC's challenge, which argues that the [silvicultural] rule is inconsistent with the statute's definition of the term 'point source' [wa]s not based on grounds that have arisen since the expiration of the period during which the rule was subject to challenge" under 33 U.S.C § 1369(b). *Amicus* Br. (Dkt. 42), at 13. Subsequently, however, NEDC honed its argument to clearly challenge only whether the Rule could exclude stormwater discharges associated with logging activities that are collected and channeled by man. NEDC argued that this would not be "natural runoff" within the meaning of the Silvicultural Rule. The term "natural runoff" is ambiguous, and neither the Rule itself nor EPA statements in the preamble clearly addressed whether such channeled and collected runoff is included in the term "natural runoff." The first time EPA expressed in an official document its interpretation that "natural runoff" would include runoff that is channeled, ditched or culverted into man-made structures was in its *amicus* brief in this matter.

2011 WL 197641, at *8. At the time an ambiguous regulation is promulgated, however, the public cannot reasonably be expected to challenge potential regulatory interpretations that are textually plausible but that the agency has not contemporaneously offered and may never adopt. Indeed, a rule encouraging such challenges to hypothetical interpretations would likely only foster unnecessary litigation.

Thus, if EPA promulgates an ambiguous regulation and *subsequently* offers an interpretation of its regulation in an *amicus* brief that a court determines is plainly erroneous or would bring the regulation into conflict with the plain terms of the CWA, Section 1369(b) does not bar the court in a citizen suit from rejecting the interpretation on that narrow ground. This Silvicultural Rule was ambiguous at the time the rule was promulgated. *E.g.*, 617 F.3d at 1191 ("[T]here are two possible readings of the Silvicultural Rule."); *see also supra* n.5. A citizen suit, therefore, could properly challenge a non-contemporaneous agency interpretation set forth for the first time in an *amicus* brief, such as EPA's interpretation here.

Dated: February 10, 2011 Respectfully submitted,

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FEDERAL STATUTES AND REGULATIONS

33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

* * *

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

* * *

33 U.S.C. § 1288. Areawide waste treatment management

* * *

(b) Planning process

(1)(A) Not later than one year after the date of designation of any organization under subsection (a) of this section such organization shall have in operation a continuing areawide waste treatment management planning process consistent with section 1281 of this title. Plans prepared in accordance with this process shall contain alternatives for waste treatment management, and be applicable to all wastes generated within the area involved. The initial plan prepared in accordance with such process shall be certified by the Governor and submitted to the Administrator not later than two years after the planning process is in operation.

* * *

(2) Any plan prepared under such process shall include, but not be limited to—

* * *

(F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(G) a process to (i) identify, if appropriate, mine-related sources of pollution including new, current, and abandoned surface and underground mine runoff, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(H) a process to (i) identify construction activity related sources of pollution, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

* * *

(e) Permits not to conflict with approved plans

No permit under section 1342 of this title shall be issued for any point source which is in conflict with a

plan approved pursuant to subsection (b) of this section.

* * *

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1312. Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(l) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources

shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

* * *

33 U.S.C. § 1313. Water quality standards and implementation plans

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(c) Review; revised standards; publication

* * *

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

* * *

33 U.S.C. § 1314. Information and guidelines

* * *

(e) Best management practices for industry

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, may publish regulations, supplemental to any effluent limitations specified under subsections (b) and (c) of this section for a class or category of point sources, for any specific pollutant which the Administrator is charged with a duty to regulate as a toxic or hazardous pollutant under section 1317(a)(1) or 1321 of this title, to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage which the Administrator determines are associated with or ancillary to the industrial manufacturing or treatment process within such class or category of point sources and may contribute significant amounts of such pollutants to navigable waters. Any applicable controls established under this subsection shall be included as a requirement for the purposes of section 1311, 1312, 1316, 1317, or 1343 of this title, as the case may be, in any permit issued to a point source pursuant to section 1342 of this title.

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies,

the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

* * *

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

* * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. * * *

(l) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or

indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

* * *

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for

stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

* * *

(r) Discharges incidental to the normal operation of recreational vessels

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

33 U.S.C. § 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * *

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and

standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

* * *

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

* * *

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

* * *

33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such

State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

* * *

33 U.S.C. § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316

and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

* * *

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

* * *

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent

standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

* * *

33 U.S.C. § 1369. Administrative procedure and judicial review

* * *

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business

which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(3) Award of fees

In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

* * *

40 C.F.R. § 125.4 (1975) Exclusions.

The following do not require an NPDES permit:

* * *

(j) Discharges of pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff from orchards, cultivated crops, pastures, rangelands, and forest lands, except that this exclusion shall not apply to the following:

* * *

(5) Discharges from any agricultural or silvicultural activity which have been identified by the Regional Administrator or the Director of the State water pollution control agency or interstate agency as a significant contributor of pollution.

40 C.F.R. § 124.85 (1976) Silvicultural activities.

(a) *Definitions.* For the purpose of this section:

(1) The term "silvicultural point source" means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters.

Comment: This term does not include nonpoint source activities inherent to silviculture such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road construction and maintenance from which runoff results from precipitation events. However, some of these activities (such as stream crossings for roads) may involve point source discharges of dredged or fill material which may require a § 404 permit (see 33 CFR 209.120).

(2) The term "rock crushing and gravel washing facilities" means those facilities which process crushed and broken stone, gravel and riprap (see 40 CFR 436,

Subpart B, and the effluent limitations guidelines pursuant thereto).

(3) The term "log sorting and log storage facilities" means those facilities wherein discharges result from the holding of unprocessed wood, i.e. logs or roundwood with bark or after removal of bark in self-contained bodies of water (mill ponds or log ponds) or land storage where water is applied intentionally on the logs (wet decking). (See 40 CFR 429, Subpart J, and the effluent limitations guidelines pursuant thereto).

(b) *Application for Permit.* (1) Any person discharging or proposing to discharge pollutants from a silvicultural point source, who has not previously submitted an NPDES permit application in reliance on the prior exclusion of silvicultural activities from the permit program, shall file such an application with the Director by December 31, 1976.

* * *

40 C.F.R. § 122.2 Definitions.

The following definitions apply to Parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

* * *

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

* * *

Facility or activity means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

* * *

Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete

fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

* * *

Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

* * *

40 C.F.R. § 122.3 Exclusions.

The following discharges do not require NPDES permits:

* * *

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

* * *

40 C.F.R. § 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.*

(1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(i) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii) A discharge associated with industrial activity (see § 122.26(a)(4));

(iii) A discharge from a large municipal separate storm sewer system;

(iv) A discharge from a medium municipal separate storm sewer system;

(v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under pa-

ragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2.

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:

(A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2.

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged to waters of the United States; and

(D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

Note to paragraph (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) Large and medium municipal separate storm sewer systems.

(i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(1) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4)(i), (ii), and (iii) or (b)(7)(i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

* * *

(6) Non-municipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

* * *

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to § 122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage un-

der an NPDES permit in accordance with §§ 122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

(b) *Definitions.*

* * *

(8) *Municipal separate storm sewer* means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency

under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) *Outfall* means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

* * *

(13) *Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) *Storm water discharge associated with industrial activity* means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in

this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging

in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373;

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under 40 CFR 434.11(l) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are min-

ing sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221–25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those

portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221–25;

* * *

40 C.F.R. § 122.27 Silvicultural activities (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.

(b) *Definitions.*

(1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and Part 233).

(2) *Rock crushing and gravel washing facilities* means facilities which process crushed and broken stone, gravel, and riprap (See 40 CFR Part 436, Subpart B, including the effluent limitations guidelines).

(3) *Log sorting and log storage facilities* means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking). (See 40 CFR Part 429, Subpart I, including the effluent limitations guidelines).

40 C.F.R. § 122.28 General permits (applicable to State NPDES programs, see § 123.25).

(a) *Coverage.* The Director may issue a general permit in accordance with the following:

(1) *Area.* The general permit shall be written to cover one or more categories or subcategories of discharges or sludge use or disposal practices or facilities described in the permit under paragraph (a)(2)(ii) of this section, except those covered by individual permits, within a geographic area. The area should correspond to existing geographic or political boundaries such as:

(i) Designated planning areas under sections 208 and 303 of CWA;

(ii) Sewer districts or sewer authorities;

(iii) City, county, or State political boundaries;

(iv) State highway systems;

(v) Standard metropolitan statistical areas as defined by the Office of Management and Budget;

(vi) Urbanized areas as designated by the Bureau of the Census according to criteria in 30 FR 15202 (May 1, 1974); or

(vii) Any other appropriate division or combination of boundaries.

(2) *Sources.* The general permit may be written to regulate one or more categories or subcategories of discharges or sludge use or disposal practices or facilities, within the area described in paragraph (a)(1) of this section, where the sources within a covered subcategory of discharges are either:

(i) Storm water point sources; or

(ii) One or more categories or subcategories of point sources other than storm water point sources, or one or more categories or subcategories of "treatment works treating domestic sewage", if the sources or "treatment works treating domestic sewage" within each category or subcategory all:

(A) Involve the same or substantially similar types of operations;

(B) Discharge the same types of wastes or engage in the same types of sludge use or disposal practices;

(C) Require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal;

(D) Require the same or similar monitoring; and

(E) In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

* * *

OREGON STATUTES AND RULES

Or. Rev. Stat. § 527.765. Best management practices for maintenance of water quality

(1) The State Board of Forestry shall establish best management practices and other rules applying to forest practices as necessary to insure that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair the achievement and maintenance of water quality standards established by the Environmental Quality Commission for the waters of the state. Such best management practices shall consist of forest practices rules adopted to prevent or reduce pollution of waters of the state. Factors to be considered by the board in establishing best management practices shall include, where applicable, but not be limited to:

(a) Beneficial uses of waters potentially impacted;

(b) The effects of past forest practices on beneficial uses of water;

(c) Appropriate practices employed by other forest managers;

(d) Technical, economic and institutional feasibility; and

(e) Natural variations in geomorphology and hydrology.

(2) The board shall consult with the Environmental

Quality Commission in adoption and review of best management practices and other rules to address nonpoint source discharges of pollutants resulting from forest operations on forestlands.

(3)(a) Notwithstanding ORS 183.310 (8), upon written petition for rulemaking under ORS 183.390 of any interested person or agency, the board shall review the best management practices adopted pursuant to this section. In addition to all other requirements of law, the petition must allege with reasonable specificity that nonpoint source discharges of pollutants resulting from forest operations being conducted in accordance with the best management practices are a significant contributor to violations of such standards.

(b) Except as provided in paragraph (c) of this subsection, if the board determines that forest operations being conducted in accordance with the best management practices are neither significantly responsible for particular water quality standards not being met nor are a significant contributor to violations of such standards, the board shall issue an order dismissing the petition.

(c) If the petition for review of best management practices is made by the Environmental Quality Commission, the board shall not terminate the review without the concurrence of the commission, unless the board commences rulemaking in accordance with paragraph (e) of this subsection.

(d) If a petition for review is dismissed, upon conclusion of the review, the board shall issue an order

that includes findings regarding specific allegations in the petition and shall state the board's reasons for any conclusions to the contrary.

(e) If, pursuant to review, the board determines that best management practices should be reviewed, the board shall commence rulemaking proceedings for that purpose. Rules specifying the revised best management practices must be adopted not later than two years from the filing date of the petition for review unless the board, with concurrence of the Environmental Quality Commission, finds that special circumstances require additional time.

(f) Notwithstanding the time limitation established in paragraph (e) of this subsection, at the request of the Environmental Quality Commission, the board shall take action as quickly as practicable to prevent significant damage to beneficial uses identified by the commission while the board is revising its best management practices and rules as provided for in this section.

Or. Admin. R. 629-625-0000 Purpose

(1) Forest roads are essential to forest management and contribute to providing jobs, products, tax base and other social and economic benefits.

(2) OAR 629-625-0000 through 629-625-0650 shall be known as the road construction and maintenance rules.

(3) The purpose of the road construction and main-

tenance rules is to establish standards for locating, designing, constructing and maintaining efficient and beneficial forest roads; locating and operating rock pits and quarries; and vacating roads, rock pits, and quarries that are no longer needed; in manners that provide the maximum practical protection to maintain forest productivity, water quality, and fish and wildlife habitat.

(4) The road construction and maintenance rules shall apply to all forest practices regions unless otherwise indicated.

Or. Admin. R. 629-625-0100 Written Plans for Road Construction

(1) A properly located, designed, and constructed road greatly reduces potential impacts to water quality, forest productivity, fish, and wildlife habitat. To prevent improperly located, designed, or constructed roads, a written plan is required in the sections listed below.

(2) In addition to the requirements of the water protection rules, operators must submit a written plan to the State Forester before:

(a) Constructing a road where there is an apparent risk of road-generated materials entering waters of the state from direct placement, rolling, falling, blasting, landslide or debris flow;

(b) Conducting machine activity in Type F or Type D streams, lakes or significant wetlands; or

(c) Constructing roads in riparian management areas.

(3) Operators shall submit a written plan to the State Forester before constructing roads on high landslide hazard locations. Operators and the State Forester shall share responsibility to identify high landslide hazard locations and to determine if there is public safety exposure from shallow, rapidly moving landslides using methods described in OAR 629-623-0000 through 0300. If there is public safety exposure, then the practices described in 629-623-0400 through 0800 shall also apply.

(4) In addition to the requirements of the water protection rules, operators shall submit a written plan to the State Forester before placing woody debris or boulders in stream channels for stream enhancement.

Or. Admin. R. 629-625-0200 Road Location

(1) The purpose of this rule is to ensure roads are located where potential impacts to waters of the state are minimized.

(2) When locating roads, operators shall designate road locations which minimize the risk of materials entering waters of the state and minimize disturbance to channels, lakes, wetlands and floodplains.

(3) Operators shall avoid locating roads on steep slopes, slide areas, high landslide hazard locations, and in wetlands, riparian management areas, channels or floodplains where viable alternatives exist.

(4) Operators shall minimize the number of stream crossings.

(5) To reduce the duplication of road systems and associated ground disturbance, operators shall make use of existing roads where practical. Where roads traverse land in another ownership and will adequately serve the operation, investigate options for using those roads before constructing new roads.

Or. Admin. R. 629-625-0300 Road Design

(1) The purpose of OARs 629-625-0300 through 629-625-0340 is to provide design specifications for forest roads that protect water quality.

(2) Operators shall design and construct roads to limit the alteration of natural slopes and drainage patterns to that which will safely accommodate the anticipated use of the road and will also protect waters of the state.

Or. Admin. R. 629-625-0310 Road Prism

(1) Operators shall use variable grades and alignments to avoid less suitable terrain so that the road prism is the least disturbing to protected resources, avoids steep sidehill areas, wet areas and potentially unstable areas as safe, effective vehicle use requirements allow.

(2) Operators shall end-haul excess material from steep slopes or high landslide hazard locations where needed to prevent landslides.

(3) Operators shall design roads no wider than necessary to accommodate the anticipated use.

(4) Operators shall design cut and fill slopes to minimize the risk of landslides.

(5) Operators shall stabilize road fills as needed to prevent fill failure and subsequent damage to waters of the state using compaction, buttressing, subsurface drainage, rock facing or other effective means.

Or. Admin. R. 629-625-0320 Stream Crossing Structures

(1) Operators shall design and construct stream crossing structures (culverts, bridges and fords) to:

(a) Minimize excavation of side slopes near the channel.

(b) Minimize the volume of material in the fill.

(A) Minimizing fill material is accomplished by restricting the width and height of the fill to the amount needed for safe use of the road by vehicles, and by providing adequate cover over the culvert or other drainage structure.

(B) Fills over 15 feet deep contain a large volume of material that can be a considerable risk to downstream beneficial uses if the material moves downstream by water. Consequently, for any fill over 15 feet deep operators shall submit to the State Forester a written plan that describes the

fill and drainage structure design. Written plans shall include a design that minimizes the likelihood of:

(i) Surface erosion;

(ii) Embankment failure; and

(iii) Downstream movement of fill material.

(c) Prevent erosion of the fill and channel.

(2) Operators shall design and construct stream crossings (culverts, bridges, and fords) to:

(a) Pass a peak flow that at least corresponds to the 50-year return interval. When determining the size of culvert needed to pass a peak flow corresponding to the 50-year return interval, operators shall select a size that is adequate to preclude ponding of water higher than the top of the culvert; and

(b) Allow migration of adult and juvenile fish upstream and downstream during conditions when fish movement in that stream normally occurs.

(3) An exception to the requirements in subsection (2)(a) of this rule is allowed to reduce the height of fills where roads cross wide flood plains. Such an exception shall be allowed if the operator obtains approval of a plan for an alternate practice. The State Forester will approve such a plan when the plan demonstrates:

(a) The stream crossing site includes a wide flood plain; and

(b) The stream crossing structure matches the size of the active channel and is covered by the minimum fill necessary to protect the structure;

(c) Except for culvert cover, soil fill is not placed in the flood plain; and

(d) The downstream edge of all fill is armored with rock of sufficient size and depth to protect the fill from eroding when a flood flow occurs.

Or. Admin. R. 629-625-0330 Drainage

(1) The purpose of this rule is to provide a drainage system on new and reconstructed roads that minimizes alteration of stream channels and the risk of sediment delivery to waters of the state. Drainage structures should be located based on the priority listed below. When there is a conflict between the requirements of sections (2) through (6) of this rule, the lowest numbered section takes precedence, and the later-numbered and conflicting section shall not be implemented.

(2) Operators shall not concentrate road drainage water into headwalls, slide areas, high landslide hazard locations, or steep erodible fillslopes.

(3) Operators shall not divert water from stream channels into roadside ditches.

(4) Operators shall install dips, water bars, or cross

drainage culverts above and away from stream crossings so that road drainage water may be filtered before entering waters of the state.

(5) Operators shall provide drainage when roads cross or expose springs, seeps, or wet areas.

(6) Operators shall provide a drainage system using grade reversals, surface sloping, ditches, culverts and/or waterbars as necessary to minimize development of gully erosion of the road prism or slopes below the road.

Or. Admin. R. 629-625-0430 Stream Protection

(1) When constructing stream crossings, operators shall minimize disturbance to banks, existing channels, and riparian management areas.

(2) In addition to the requirements of the water protection rules, operators shall keep machine activity in beds of streams to an absolute minimum. Acceptable activities where machines are allowed in streambeds, such as installing culverts, shall be restricted to periods of low water levels. Operators shall submit a written plan to the State Forester for machine activity in Type F or Type D streams, lakes, and significant wetlands.

(3) For all roads constructed or reconstructed operators shall install water crossing structures where needed to maintain the flow of water and passage of adult and juvenile fish between side channels or wetlands and main channels.

(4) Operators shall leave or re-establish areas of vegetation between roads and waters of the state to protect water quality.

(5) Operators shall remove temporary stream crossing structures promptly after use, and shall construct effective sediment barriers at approaches to channels.

Or. Admin. R. 629-625-0600 Road Maintenance

(1) The purpose of this rule is to protect water quality by timely maintenance of all active and inactive roads.

(2) Operators shall maintain active and inactive roads in a manner sufficient both to provide a stable surface and to keep the drainage system operating as necessary to protect water quality.

(3) Operators shall inspect and maintain culvert inlets and outlets, drainage structures and ditches before and during the rainy season as necessary to diminish the likelihood of clogging and the possibility of washouts.

(4) Operators shall provide effective road surface drainage, such as water barring, surface crowning, constructing sediment barriers, or outsloping prior to the rainy and runoff seasons.

(5) When applying road oil or other surface stabilizing materials, operators shall plan and conduct the operation in a manner as to prevent entry of these materials into waters of the state.

(6) In the Northwest and Southwest Oregon Regions, operators shall maintain and repair active and inactive roads as needed to minimize damage to waters of the state. This may include maintenance and repair of all portions of the road prism during and after intense winter storms, as safety, weather, soil moisture and other considerations permit.

(7) Operators shall place material removed from ditches in a stable location.

(8) In order to maintain fish passage through water crossing structures, operators shall:

(a) Maintain conditions at the structures so that passage of adult and juvenile fish is not impaired during periods when fish movement normally occurs. This standard is required only for roads constructed or reconstructed after September 1994, but is encouraged for all other roads; and

(b) As reasonably practicable, keep structures cleared of woody debris and deposits of sediment that would impair fish passage.

(c) Other fish passage requirements under the authority of ORS 498.268 and 509.605 that are administered by other state agencies may be applicable to water crossing structures, including those constructed before September 1, 1994.

(9) Where needed to protect water quality, as directed by the State Forester, operators shall place additional cross drainage structures on existing ac-

tive roads within their ownership prior to hauling to meet the requirements of OAR 629-625-0330.

Or. Admin. R. 629-625-0700 Wet Weather Road Use

(1) The purpose of this rule is to reduce delivery of fine sediment to streams caused by the use of forest roads during wet periods that may adversely affect downstream water quality in Type F or Type D streams.

(2) Operators shall use durable surfacing or other effective measures that resist deep rutting or development of a layer of mud on top of the road surface on road segments that drain directly to streams on active roads that will be used for log hauling during wet periods.

(3) Operators shall cease active road use where the surface is deeply rutted or covered by a layer of mud and where runoff from that road segment is causing a visible increase in the turbidity of Type F or Type D streams as measured above and below the effects of the road.

Or. Admin. R. 629-635-0100 Purpose and Goals

(1) The leading use on private forestland is the growing and harvesting of trees, consistent with sound management of soil, air, water, fish and wildlife resources. There is a unique concentration of public resource values in and near waters of the state because these areas are critical for the overall maintenance of fish and wildlife and for maintaining water quality.

Consequently, the policies of the Forest Practices Act, including encouraging economically efficient forest practices, are best achieved by focusing protection measures in riparian management areas, where the emphasis is on providing water quality and fish and wildlife habitat.

(2) OAR 629-635-0000 through 629-660-0060 are known as the "water protection rules."

(3) The purpose of the water protection rules is to protect, maintain and, where appropriate, improve the functions and values of streams, lakes, wetlands, and riparian management areas. Active management is encouraged where appropriate to meet this purpose. These functions and values include water quality, hydrologic functions, the growing and harvesting of trees, and fish and wildlife resources.

(4) Plans for alternate practices may be used to alter vegetation retention requirements in the water protection rules based on local site conditions. The plans may include but are not limited to site specific vegetation retention prescriptions as described in OAR 629-640-0400 (for streams) and 629-645-0020 (for wetlands). Operators are encouraged to:

(a) Evaluate site specific conditions in waters and riparian management areas; and

(b) Develop plans for alternate practices that will:

(A) Maintain, enhance, or restore riparian functions in streams, wetlands, lakes; or

(B) Meet the purposes and goals of the water protection rules while better meeting operational or other objectives.

(5) General vegetation retention prescriptions for streams, lakes and wetlands apply where current vegetation conditions within the riparian management area have achieved or are likely to achieve the desired future condition in a "timely manner." Landowners are encouraged to manage stands within riparian management areas in order to grow trees in excess of what must be retained so that the opportunity is available to harvest the excess.

(6) Alternative vegetation retention prescriptions for streams allow incentives for operators to actively manage vegetation where existing vegetation conditions are not likely to achieve the desired future condition in a "timely manner."

(7) The overall goal of the water protection rules is to provide resource protection during operations adjacent to and within streams, lakes, wetlands and riparian management areas so that, while continuing to grow and harvest trees, the protection goals for fish, wildlife, and water quality are met.

(a) The protection goal for water quality (as prescribed in ORS 527.765) is to ensure through the described forest practices that, to the maximum extent practicable, non-point source discharges of pollutants resulting from forest operations do not impair the achievement and maintenance of the water quality standards.

(b) The protection goal for fish is to establish and retain vegetation consistent with the vegetation retention objectives described in OAR 629-640-0000 (streams), 629-645-0000 (significant wetlands), and 629-650-0000 (lakes) that will maintain water quality and provide aquatic habitat components and functions such as shade, large wood, and nutrients.

(c) The protection goal for wildlife is to establish and retain vegetation consistent with the vegetation retention objectives described in OAR 629-640-0000 (streams), 629-645-0000 (significant wetlands), and 629-650-0000 (lakes) that will maintain water quality and habitat components such as live trees of various species and size classes, shade, snags, downed wood, and food within riparian management areas. For wildlife species not necessarily reliant upon riparian areas, habitat in riparian management areas is also emphasized in order to capitalize on the multiple benefits of vegetation retained along waters for a variety of purposes.

Or. Admin. R. 629-635-0110 Monitoring

(1) Monitoring and evaluation of the water protection rules are necessary because of the innovative approach taken in the rules. Monitoring and evaluation are needed to increase the level of confidence of all concerned that the rules will maintain and improve the condition of the riparian vegetation and waters of the state over time.

(2) In cooperation with state and federal agencies, landowners and other interested parties, the department shall conduct monitoring on a continuing

basis to evaluate the effectiveness of the water protection rules. The monitoring shall determine the effectiveness of the rules to meet the goals of the Forest Practices Act and the purposes stated in the rules, as well as their workability and operability.

(3) It is the Board of Forestry's intent that the department and its cooperators place a high priority on assessing the monitoring needs and securing adequate resources to conduct the necessary monitoring. The department shall work with its cooperators and the Legislature to secure the necessary resources, funding and coordination for effective monitoring.

(4) The department shall report to the Board of Forestry annually about current monitoring efforts and, in a timely manner, present findings and recommendations for changes to practices. The Board of Forestry shall consider the findings and recommendations and take appropriate action.

Or. Admin. R. 629-635-0130 Written Plans for Streams, Lakes, Wetlands and Riparian Management Areas

(1) Operators shall submit to the State Forester a written plan before conducting any operation requiring notification under OAR 629-605-0140(1) within:

(a) 100 feet of fish use or domestic water use streams (classified as Type F or Type D under OAR 629-635-0200), except as described in section (3) of this rule;

(b) 300 feet of significant wetlands;

(c) 100 feet of large lakes.

(2) In addition to the written plan requirements in OAR 629-605-0170, operators shall specifically describe in the written plan for operations within 100 feet of domestic water use portions of Type F or D streams the practices and methods that will be used to prevent sediment from entering waters of the state.

(3) The State Forester may waive, in writing, the requirement for a written plan within 100 feet of a Type F or Type D stream, if the State Forester determines the intended forest practice will not directly affect the physical components of the riparian management area. "Physical components" means materials such as, but not limited to, vegetation, snags, rocks, and soil. "Directly affect" means that physical components will be moved, disturbed, or otherwise altered by the operation activity, even if only temporarily.

(4) Written plans required under section (1)(a) and (1)(b) of this rule are subject to the process required for a written plan pursuant to ORS 527.670(8) through (12), and appeal pursuant to 527.700.

Or. Admin. R. 629-670-0000 Purpose

OAR 629-670-0000 through 629-670-0350 shall be known as the Oregon Forest Practices Act Enforcement and Civil Penalty Rules. These rules direct the State Forester to take fair and uniform enforcement action when there is a violation of the Oregon Forest

Practices Act. OAR 629-670-0300 and 629-670-0310 provide an outline of contested case hearings procedures, with specific contested case rules in OAR chapter 629, division 1 and OAR chapter 137, division 3.

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Nos. 11-338 and 11-347

In the Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, ET AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, RESPONDENT

GEORGIA-PACIFIC WEST, INC., ET AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX – VOLUME II

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, an Oregon non-profit corporation,

Plaintiff,

v.

MARVIN BROWN, Oregon State Forester, in his official capacity; **STEPHEN HOBBS, BARBARA CRAIG, DIANE SNYDER, LARRY GIUSTINA, CHRIS HEFFERNAN, WILLIAM HUTCHISON, AND JENNIFER PHILLIPPI,** members of the Oregon Board of Forestry, in their official capacities; **HAMPTON TREE FARMS, INCORPORATED**, an Oregon domestic business corporation; **STIMSON LUMBER COMPANY**, an Oregon domestic business corporation; **GEORGIA-PACIFIC WEST, INCORPORATED**, an Oregon domestic business corporation; and **SWANSON GROUP, INCORPORATED**, an Oregon domestic business corporation,

Defendants.

Case No.: 06-1270-KI

FIRST AMENDED COMPLAINT

I. INTRODUCTION

1. This action is a citizen suit brought under Section 505 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §1365. Plaintiff Northwest Environmental Defense Center ("NEDC") seeks injunctive relief, a declaratory judgment, the imposition of civil penalties, and an award of costs, including attorneys' and expert witness fees, for Defendants' repeated and ongoing violations of the CWA.

2. This lawsuit concerns Defendants' ongoing discharges of pollutants and/or industrial stormwater from ditches, channels, culverts, pipes and other "point sources" along the Trask River and Sam Downs roads in the Tillamook State Forest. The section of the Trask River Road at issue generally runs along the west side of the South Fork Trask River, between the first road bridge that crosses the South Fork Trask River south of the North Fork Trask River and the confluence of the South Fork Trask River and Edwards Creek ("Trask River Road"). *See* Exhibit 1, Appendix 1. The section of the Sam Downs Road at issue generally runs along the Little South Fork of the Kilchis River approximately 2.7 road miles to approximately 4.1 road miles northeast of the Mapes Creek boat ramp, out the Kilchis River and Sam Downs roads ("Sam Downs Road"). *See* Exhibit 1, Appendix 2.

3. Like many logging roads in Oregon State Forests, the Trask River Road and Sam Downs Road were designed and constructed, and are currently maintained by Defendants, to collect, channel, and then deliver stormwater to rivers and streams. The stormwater discharged from these roads is polluted with sediment and other pollutants; consequently, these discharges degrade water quality, contribute to the destruction of salmonid habitat, and adversely impact a wide variety of aquatic life. None of the discharges is authorized by a National Pollutant

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Discharge Elimination System ("NPDES") permit issued pursuant to Section 402 of the Act, 33 U.S.C. §1342.

4. Plaintiff alleges that Defendants' unauthorized discharges of polluted stormwater are illegal and in violation of Sections 301(a) and 402 of the Act, 33 U.S.C. §§1311(a) and 1342. As relevant here, Section 301(a) prohibits the "discharge of pollutants" by any person unless in compliance with Section 402. Section 402(a) empowers the U.S. Environmental Protection Agency ("EPA") to issue NPDES permits authorizing "discharges of pollutants." Therefore, one way Defendants could comply with Section 301(a) would be to obtain and comply with NPDES permits authorizing their "discharges of pollutants." *See* 33 U.S.C. §1311(a) and §1342(k). Alternatively, Defendants' discharges are subject to Section 402(p) of the Act, 33 U.S.C. §1342(p)—which requires NPDES permits for "stormwater discharges associated with industrial activities" (hereafter "industrial stormwater")—because Defendants' maintenance of and timber hauling on the Trask River Road and Sam Downs Road constitute "industrial activities" under 40 C.F.R. 122.26(b)(14). If Section 402(p) applies to Defendants' discharges, Defendants could comply with Sections 301(a) and 402(p) by obtaining NPDES permits authorizing their discharges of industrial stormwater. Without NPDES permits, Defendants' discharges of pollutants and/or industrial stormwater from the Trask River Road and Sam Downs Road are unauthorized and in violation of the Act.

5. The Oregon Department of Forestry and the Oregon Board of Forestry are responsible for these discharges because they own, operate, maintain and/or control the logging roads in Oregon State Forests. Hampton Tree Farms, Incorporated ("Hampton Tree Farms"), Stimson Lumber Company, Georgia-Pacific West, Incorporated ("Georgia-Pacific West"), and Swanson Group, Incorporated ("Swanson Group"), are responsible for the discharges because

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they haul timber on the roads—an industrial activity that grinds up the road surface and creates much of the sediment and other pollutants delivered to rivers and streams—and because their timber sale contracts with the Oregon Department of Forestry obligate them to maintain the roads on which they haul.

6. Plaintiff also alleges that Defendants have violated the Act by failing to apply for NPDES permits for their discharges from the Trask River Road, the Sam Downs Road, and the hundreds of other locations throughout Oregon State Forests where logging roads deliver pollutants and/or industrial stormwater to rivers and streams.

II. JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to 33 U.S.C. §1365 (CWA citizen suit provision) and 28 U.S.C. §1331 (federal question). Defendants are in violation of an "effluent standard or limitation" as defined by Section 505 of the Act, 33 U.S.C. §1365. The requested relief is proper under 28 U.S.C. §§2201 and 2202, and 33 U.S.C. §1365.

8. Plaintiff has satisfied the jurisdictional requirements for bringing this suit. Under Section 505(b)(1)(A) of the Act, 33 U.S.C. §1365(b)(1)(A), by certified letter dated and postmarked June 19, 2006, NEDC notified Defendants of their violations of the Act and of NEDC's intent to sue for those violations ("Notice Letter"). Additionally, by certified letter dated and postmarked July 21, 2006, NEDC sent a second notice letter ("Second Notice Letter") to Swanson Group, notifying Swanson Group of its violations of the Act and of NEDC's intent to sue for those violations. Copies of the Notice Letter and Second Notice Letter are attached to this complaint as Exhibits 1 & 2. Plaintiff notified the Administrator of the EPA, the Administrator of EPA Region 10, and the Director of the Oregon Department of Environmental Quality ("ODEQ") of its intent to sue Defendants by mailing copies of the Notice Letter to those

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officials on June 19, 2006 and by mailing copies of the Second Notice Letter to those officials on July 21, 2006.

9. More than sixty days have passed since the Notice Letter and Second Notice Letter were served and the violations complained of are continuing or reasonably likely to continue to occur. Defendants are in violation of the Clean Water Act. Neither the EPA nor the ODEQ has commenced any action constituting diligent prosecution to redress these violations.

10. Venue is appropriate in the District of Oregon under Section 505(c)(1) of the Act, 33 U.S.C. §1365(c)(1), because sources of the violations complained of are located in this District, in Tillamook County, Oregon.

11. A copy of the Complaint was served, and a copy of this First Amended Complaint is being served, upon the Attorney General of the United States, the Administrator of the EPA, and the Administrator of EPA Region 10, as required by 33 U.S.C. §1365(c)(3) and 40 C.F.R. 135.4.

III. PARTIES

12. Plaintiff Northwest Environmental Defense Center is a membership organization suing on behalf of itself and its members. NEDC is an independent non-profit corporation organized and existing under the laws of the State of Oregon. NEDC maintains its principal place of business in Multnomah County, Oregon. Since 1969, the staff, student volunteers, and members of NEDC have advocated for cleaner water and air and for the preservation of public lands and wildlife habitat across the Pacific Northwest.

13. The mission of NEDC is to protect and conserve the environment and natural resources of the Pacific Northwest. NEDC and its members have a particular interest in, and derive aesthetic, recreational, and other benefits from, Oregon's rivers, streams, lakes, and

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bays—including Tillamook Bay, the Trask River, the South Fork Trask River, the Kilchis River, the Little South Fork of the Kilchis River, and the waters tributary to them—as well as the aquatic species that use and rely on those waters. NEDC and its members work to conserve and protect Oregon's water resources and aquatic species. NEDC's members use waters and adjacent lands downstream from Defendants' discharges for recreational and other activities, including boating, fishing, nature watching, hiking, and aesthetic and recreational enjoyment. NEDC's members use and enjoy the Trask and Kilchis rivers, as well as waters that are tributary to those rivers, for fishing, recreation and other activities. Additionally, many members of NEDC live or work near Oregon waters or otherwise have an interest in Oregon waters. NEDC and its members intend to continue all of these activities in the future.

14. NEDC has standing to bring this lawsuit. NEDC and its members are "citizens" as defined by Section 505(g) of the Act, 33 U.S.C. §1365(g). NEDC has at least one member who is injured by Defendants' discharges of pollutants and stormwater. Recreational, economic, aesthetic, conservation, health, and/or other interests of NEDC and its members have been, are being, and will be adversely affected by Defendants' unauthorized discharges of pollutants and/or industrial stormwater to the Kilchis and Trask river systems. Plaintiff's and its members' interests in the Trask River, the South Fork Trask River, the Kilchis River, the Little South Fork of the Kilchis River, Tillamook Bay, and the waters tributary to those waters are diminished by their polluted state and by Defendants' unauthorized and illegal discharges of pollutants and/or industrial stormwater. The relief sought in this lawsuit can redress the injuries to these interests.

15. Defendant Brown is the Oregon State Forester and the administrative chief of the Oregon Department of Forestry ("ODF"). Defendant Brown is authorized to act on all matters pertaining to forestry in Oregon, including collecting and sharing information about the

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conditions of Oregon's forests, protecting and conserving forest resources, and managing 780,000 acres of state-owned forests. As Oregon State Forester and head of ODF, Defendant Brown is responsible for ensuring that discharges of pollutants and/or industrial stormwater from logging roads in Oregon State Forests comply with the CWA.

16. Defendants Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, and Phillippi are members of the Oregon Board of Forestry ("OBF"), which supervises all matters of forest policy within Oregon, appoints the State Forester, adopts rules regulating forest practices, and provides general supervision of the State Forester's duties in managing the Oregon Department of Forestry. As members of the OBF, Defendants Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, and Phillippi are responsible for ensuring that discharges of pollutants and/or industrial stormwater from logging roads in Oregon State Forests comply with the CWA.

17. Defendant Hampton Tree Farms, Incorporated, is a domestic business corporation organized and existing under the laws of the State of Oregon. Hampton Tree Farms purchased the Ed's BSM, Toll, and Yellow Bus timber sales from ODF and is harvesting timber in the Tillamook State Forest. Hampton Tree Farms and/or its authorized agent is hauling timber along the Trask River Road in the Tillamook State Forest in Tillamook County, Oregon.

18. Defendant Stimson Lumber Company is a domestic business corporation organized and existing under the laws of the State of Oregon. Stimson Lumber Company purchased the Gold Peak and Miller timber sales from ODF and is harvesting timber in the Tillamook State Forest. Stimson Lumber Company and/or its authorized agent is hauling timber along the Trask River Road in the Tillamook State Forest in Tillamook County, Oregon.

19. Defendant Georgia-Pacific West, Incorporated, is a domestic business corporation organized and existing under the laws of the State of Oregon. Georgia-Pacific West purchased

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the Klahnberry timber sale from ODF and is harvesting timber in the Tillamook State Forest. Georgia-Pacific West and/or its authorized agent is hauling timber along the Sam Downs Road in the Tillamook State Forest in Tillamook County, Oregon.

20. Defendant Swanson Group, Incorporated, is a domestic business corporation organized and existing under the laws of the State of Oregon. Swanson Group purchased the Mutt Peak timber sale from ODF and is harvesting timber in the Tillamook State Forest. Swanson Group and/or its authorized agent is hauling timber along the Sam Downs Road in the Tillamook State Forest in Tillamook County, Oregon.

21. Defendants Brown, Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, and Phillippi are being sued in their official capacities.

IV. STATUTORY BACKGROUND

A. The CWA Generally Prohibits the Addition of Pollutants from Point Sources to Waters of the United States.

22. Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). In doing so, Congress declared a national goal of eliminating discharges of pollutants to navigable waters by 1985.

23. As relevant here, Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits "the discharge of any pollutant by any person" unless such discharge is authorized by or in compliance with Section 402 of the Act, 33 U.S.C. §1342. Section 402(a) of the Act authorizes EPA, under certain conditions, to issue NPDES permits for discharges of pollutants. 33 U.S.C. §1342(a).

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24. Federal and state regulations require any person who discharges or proposes to discharge pollutants to waters of the United States to apply for a NPDES permit. 40 C.F.R. 122.21(a); OAR 340-045-0015(2) & (5).

25. The Act defines the term "person" to mean "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. §1362(5).

26. The Act defines the term "discharge of a pollutant" to mean, in part, "any addition of any pollutant to navigable waters from any point source...." 33 U.S.C. §1362(12). By regulation, EPA defined "discharge of a pollutant" to include "additions of pollutants into waters of the United States" from "surface runoff which is collected or channelled [sic] by man" and "discharges through pipes, sewers, or other conveyances owned by a State ... which do not lead to a treatment works...." 40 C.F.R. 122.2.

27. The Act and its implementing regulations do not define the term "addition." One court recently found that "addition" generally means the introduction of a pollutant into navigable waters from any place outside the particular water body. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001).

28. The Act defines the term "pollutant" to mean, in part, "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. §1362(6).

29. The Act defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7).

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30. The Act defines the term "point source" to mean, in part, "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. §1362(14).

31. Unlike point source additions of pollutants to U.S. waters, "non-point sources" of pollution do not require NPDES permits. Instead, Section 304(f) of the Act, 33 U.S.C. §1314(f), directs EPA to disseminate information regarding non-point pollution sources, which are generally subject to state management programs developed under Sections 208 and 303(e) of the Act, 33 U.S.C. §§1288 and 1313(e). The Act and its implementing regulations do not define the term "non-point source." "Non-point source" pollution is generally understood to be diffuse run-off and other pollution that is not delivered to water bodies through a "point source."

B. EPA or a Delegated State May Authorize Discharges of Pollutants.

32. EPA may delegate administration of the NPDES permit program to states with regulatory programs meeting applicable criteria. 33 U.S.C. §1342(b); 40 C.F.R. Part 123. The State of Oregon has established a federally approved state NPDES program administered by the ODEQ. *See* OAR Chapter 340-045. Accordingly, the ODEQ may issue general and individual NPDES permits authorizing discharges of pollutants or industrial stormwater.

33. Compliance with a NPDES permit is deemed compliance with the general discharge prohibition in Section 301(a). 33 U.S.C. §1342(k).

34. A discharge of a pollutant is prohibited if EPA or a delegated state decides not to authorize the discharge by issuing a NPDES permit. 33 U.S.C. §1311(a).

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C. Discharges of Pollutants from Logging Roads Are Not Exempt from the NPDES Permit Requirement.

35. Congress has chosen to exempt certain pollutants, point sources, and activities from the requirement to obtain NPDES permits.

36. Section 402(l) of the Act, 33 U.S.C. §1342(l) (entitled "Limitation on permit requirement"), explicitly exempts from the NPDES permit requirement discharges composed entirely of return flows from irrigated agriculture and certain stormwater discharges associated with mining operations and oil and gas exploration. Section 402(l) does not exempt from the NPDES permit requirement any discharges of pollutants or industrial stormwater from logging roads.

37. The Act's definition of the term "pollutant" explicitly excludes certain wastes associated with vessels and oil and gas production. 33 U.S.C. §1362(6). The Act's definition of "pollutant" does not exclude sediment or industrial stormwater discharged from logging roads.

38. The Act's definition of the term "point source" explicitly excludes discharges of agricultural stormwater and return flows from irrigated agriculture. 33 U.S.C. §1362(14). The Act's definition of "point source" does not exclude ditches, pipes, culverts, channels or other discernible, confined, and discrete conveyances associated with logging roads.

39. EPA regulations require NPDES permits for "silvicultural point sources." 40 C.F.R. 122.27(a). According to EPA, "silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States." 40 C.F.R. 122.27(b).

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40. According to EPA, the term "silvicultural point source" "does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. 122.27(b).

41. The Ninth Circuit Court of Appeals recently held that the list of four silvicultural point source activities identified in 40 C.F.R. 122.27 is not exhaustive and that EPA may not exempt from the NPDES permit requirement discharge locations that clearly meet the statutory definition of "point source." *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1188 & 1190 (9th Cir. 2002). More recently, a federal district court in California held that conduits and channels associated with a timber company's stormwater runoff collection system need NPDES permits if they meet the statutory definition of "point source." *Environmental Protection Information Center v. Pacific Lumber Company*, 301 F.Supp.2d 1102, 1113 (N.D. Cal. 2004).

42. Discharges of pollutants from logging roads are illegal unless authorized by NPDES permits.

D. Stormwater Discharges Associated with Industrial Activity Must Be Authorized by NPDES Permits.

1. Section 402(p) of the Clean Water Act.

43. In 1987, in response in part to EPA's failure to implement the NPDES permit program for stormwater discharges, Congress enacted the supplemental stormwater permitting program in Section 402(p), 33 U.S.C. §1342(p).

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44. Section 402(p)(1) temporarily exempted discharges composed entirely of stormwater from the NPDES permit requirement. By statutory directive, the temporary exemption in Section 402(p)(1) expired on October 1, 1994.

45. Section 402(p)(2) excluded five categories of stormwater discharges—including stormwater discharges associated with industrial activities—from the temporary exemption in Section 402(p)(1). Consequently, discharges of industrial stormwater were still prohibited unless authorized by and in compliance with a NPDES permit. 40 C.F.R. 122.26(a)(1). Section 402(p)(2) requires dischargers of industrial stormwater to obtain NPDES permits.

46. Under Section 402(p)(3), permits for discharges of industrial stormwater must meet the requirements of Sections 301 and 402.

47. To ensure the timely development of NPDES permits for discharges of industrial stormwater, Section 402(p)(4) established deadlines for: 1) EPA's issuance of regulations relating to permit applications for industrial stormwater discharges; 2) the submittal of applications by industrial dischargers; 3) the approval or denial of permit applications by EPA; and 4) compliance with the NPDES permits authorizing discharges of industrial stormwater.

48. Section 402(p)(5) then directed EPA to conduct a study for purposes of: 1) identifying categories of stormwater discharges subject to the temporary exemption in Section 402(p)(1); 2) determining the nature and extent of pollutants in those discharges; and 3) establishing procedures and methods to control those discharges to the extent necessary to mitigate impacts on water quality.

49. Section 402(p)(6) directed EPA to issue regulations, based on the Section 402(p)(5) study, that designate stormwater discharges needing regulation to protect water quality and that establish a comprehensive program to regulate such designated sources. Section

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402(p)(6) required EPA to establish priorities, requirements for State stormwater management programs, and expeditious deadlines. Section 402(p)(6) also authorized EPA to include performance standards, guidelines, guidance, management practices, and treatment requirements in its program.

50. After October 1, 1994, Section 402(p) does not exempt any point source discharge of pollutants or polluted storm water from the requirement of having an NPDES permit.

2. EPA's stormwater regulations.

51. As directed by Section 402(p), EPA promulgated stormwater regulations in 1990 and 1999. *See* 40 C.F.R. 122.26; 55 FR 47,990 (November 16, 1990); and 64 FR 68,722 (December 8, 1999). EPA's stormwater regulations require dischargers of industrial stormwater to apply for an individual permit or seek coverage under a promulgated stormwater general permit by October 1, 1992 or before commencing a discharge. 40 C.F.R. 122.26(c) & (e)(1)(i); *see also* OAR 340-045-0015(2) & (5).

52. EPA determined in its stormwater regulations that "The term [storm water discharge associated with industrial activity] does not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. 122.26(b)(14).

53. EPA also determined in its stormwater regulations that "Facilities classified as Standard Industrial Classifications 24 (except 2434)..." are considered to be engaging in "industrial activity" for purposes of the term "storm water discharge associated with industrial activity." *See* 40 C.F.R. 122.26(b)(14)(ii). Logging activities are classified as Standard Industrial Code ("SIC") 2411. SIC 2411 is a subcategory of SIC 24.

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V. FACTS

A. Many Logging Roads, Including Roads in the Tillamook State Forest, Discharge Polluted Stormwater Directly to Streams.

54. According to Figure 2-5 on page 14 of Chapter 2 of the *2000 National Water Quality Inventory*, EPA found that forestry-related sediment is the fifth leading source of water quality impairment to rivers and streams nationwide.

55. In the western United States, roads are the primary source of sediment delivered to streams from forestry activities. Logging roads generally use road grade, ditches, channels, and culverts to move stormwater off the road. Ditches, channels, and culverts associated with logging roads often convey and deliver collected stormwater into existing streams and rivers. Stormwater associated with logging roads often contains sediment. Roads located on steep slopes or adjacent to streams pose the greatest risk of sediment delivery to streams.

56. On page 7 of a 1998 report commissioned by ODF and entitled *Forest Road Sediment and Drainage Monitoring Project Report for Private and State Lands in Western Oregon*, Arne Skaugset and Marganne M. Allen of the Forest Engineering Department at Oregon State University concluded that, "[o]f the 285 miles (1,506,067 feet) of forest road surveyed in the five georegions, 25 percent drained directly to streams and another 6 percent were rated 'possible' for sediment delivery."

57. On page 11 of a June 1997 report entitled *Forest Roads, Drainage, and Sediment Delivery in the Kilchis River Watershed* ("Kilchis Roads Study"), ODF found that 25% of the road system in the Kilchis River watershed was clearly delivering flow and sediment to streams and that an additional 14% of the road system was possibly delivering flow and sediment to streams. Table 1 on page 11 of the Kilchis Roads Study notes a positive delivery to channels

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from 459 different discharge points along 219,757 feet of road. Additionally, Table 1 on page 11 of the Kilchis Roads Study indicates that 224 of the identified discharge points were "live stream culverts." Live stream culverts are locations where stormwater ditches join a flowing stream that then flows through a culvert and underneath a road.

58. On page 13 of the November 1998 *Trask Watershed Assessment*, a report of the Tillamook Bay National Estuary Project, the authors of that report state that the "number of miles of unpaved road per square mile of land is a good indication of the level of effects of forest roads on the watershed. A high density (greater than 2 mi/square mile) is indicative of possible elevated sediment delivery. These figures show that all five of the heavily forested subwatersheds have road densities above the cutoff figure and are thus at risk for elevated erosion due to roads."

59. On page 14 of the November 1998 *Trask Watershed Assessment*, the authors state that the "East Fork of the South Fork and the South Fork subwatersheds have the highest areas of potential road erosion. Fish habitat values in these systems are high and this suggests that road remediation work should be focused in these two subwatersheds."

60. On page 2 of the Kilchis Roads Study, ODF stated that "[t]raffic on gravel surface roads also increases the potential for sediment delivery to streams."

B. Pollutants and Stormwater from Logging Roads Severely and Negatively Impact the Environment.

61. Salmon and trout can be adversely affected by turbidity and the addition of sediment to streams. On page 57 of the October 1998 *Kilchis Watershed Analysis*, a report of the Tillamook Bay National Estuary Project, the authors of that report note that, "[t]he negative effects of increased sediment generation include: fine sediment deposition in spawning gravels

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that can smother salmonid eggs, reduce[d] intergravel oxygen, increased turbidity in the water column that can interfere with sight-feeding by salmonids, direct burial of macroinvertebrate insects and their habitat, and bed aggradation throughout the stream network including accumulation of sediment in low gradient channels causing bank erosion and impairing navigation."

62. Both the Trask and Kilchis rivers support fish species that are in decline or are listed as "species of concern." On page 113 of the *Kilchis Watershed Analysis*, the authors of that report note that only one of the five Tillamook Basin salmonid populations is currently healthy.

C. Defendants Are Discharging Pollutants and/or Industrial Stormwater From Logging Roads To U.S. Waters Without NPDES Permits.

63. Every day on which there is 0.12 inches of precipitation or more at the Trask River Road, stormwater lands on or near the Trask River Road and is collected in man-made roadside ditches, conveyed via man-made roadside ditches, channels, culverts and other mechanisms at locations identified in the Notice Letter, and then added to unnamed streams and the South Fork Trask River, which are tributary to the Trask River and Tillamook Bay.

64. Every day on which there is 0.12 inches of precipitation or more at the Sam Downs Road, stormwater lands on or near the Sam Downs Road and is collected in man-made roadside ditches, conveyed via man-made roadside ditches, channels, culverts and other mechanisms at locations identified in the Notice Letter and Second Notice Letter, and then added to unnamed streams and the Little South Fork of the Kilchis River, which are tributary to the Kilchis River and Tillamook Bay.

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65. Stormwater added to the unnamed streams and the South Fork Trask River from the Trask River Road, and stormwater added to the unnamed streams and the Little South Fork of the Kilchis River from the Sam Downs Road, contain "pollutants" including sediment.

66. The South Fork Trask River, the Trask River, the Little South Fork of the Kilchis River, the Kilchis River, Tillamook Bay, and the unnamed streams tributary to those waters are "navigable waters" and/or "waters of the United States" as defined by the Clean Water Act and its implementing regulations.

67. The ditches, culverts, channels, pipes and other mechanisms that convey and add stormwater and pollutants from the Trask River Road to the unnamed streams and the South Fork Trask River, and the ditches, culverts, channels, pipes and other mechanisms that convey and add stormwater and pollutants from the Sam Downs Road to the unnamed streams and the Little South Fork of the Kilchis River, are "point sources." The Notice Letter and Second Notice Letter identify some of the locations of these point sources. *See* Exhibits 1 & 2.

68. Stormwater that is collected, conveyed, and delivered to waters of the United States by ditches, culverts, channels, pipes and other mechanisms along the Trask River Road, the Sam Downs Road, and other logging roads in Oregon State Forests, is not "natural runoff."

69. The Oregon State Forester is the owner or operator of a facility or activity subject to regulation under the NPDES program. The Oregon State Forester owns, operates, maintains, and/or controls logging roads in Oregon State Forests, including the Trask River Road and Sam Downs Road.

70. The Oregon Department of Forestry is the owner or operator of a facility or activity subject to regulation under the NPDES program. The Oregon Department of Forestry

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owns, operates, maintains, and/or controls logging roads in Oregon State Forests, including the Trask River Road and Sam Downs Road.

71. The Oregon Board of Forestry is the owner or operator of a facility or activity subject to regulation under the NPDES program. The Oregon Board of Forestry owns, operates, maintains, and/or controls logging roads in Oregon State Forests, including the Trask River Road and Sam Downs Road.

72. Defendant Hampton Tree Farms is the owner or operator of a facility or activity subject to regulation under the NPDES program. Defendant Hampton Tree Farms maintains, and/or is responsible for maintaining, parts of the stormwater collection system along the Trask River Road. Additionally, Defendant Hampton Tree Farms and/or its authorized agent hauls timber on the Trask River Road. Defendant Hampton Tree Farms and/or its authorized agent intends to continue maintaining and hauling timber on the Trask River Road.

73. Defendant Stimson Lumber Company is the owner or operator of a facility or activity subject to regulation under the NPDES program. Defendant Stimson Lumber Company maintains, and/or is responsible for maintaining, parts of the stormwater collection system along the Trask River Road. Additionally, Defendant Stimson Lumber Company and/or its authorized agent hauls timber on the Trask River Road. Defendant Stimson Lumber Company and/or its authorized agent intends to continue maintaining and hauling timber on the Trask River Road.

74. Defendant Georgia-Pacific West is the owner or operator of a facility or activity subject to regulation under the NPDES program. Defendant Georgia-Pacific West maintains, and/or is responsible for maintaining, parts of the stormwater collection system along the Sam Downs Road. Additionally, Defendant Georgia-Pacific West and/or its authorized agent hauls

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timber on the Sam Downs Road. Defendant Georgia-Pacific West and/or its authorized agent intends to continue maintaining and hauling timber on the Sam Downs Road.

75. Defendant Swanson Group is the owner or operator of a facility or activity subject to regulation under the NPDES program. Defendant Swanson Group maintains, and/or is responsible for maintaining, parts of the stormwater collection system along the Sam Downs Road. Additionally, Defendant Swanson Group and/or its authorized agent hauls timber on the Sam Downs Road. Defendant Swanson Group and/or its authorized agent intends to continue maintaining and hauling timber on the Sam Downs Road.

76. If discharges of stormwater from the Trask River Road and Sam Downs Road are subject to Section 402(p) of the Act, those discharges are "stormwater discharges associated with industrial activity" as defined by the Clean Water Act and its implementing regulations.

77. Defendants have not applied for or received NPDES permit coverage for their discharges of pollutants and/or industrial stormwater from the Trask River Road, the Sam Downs Road, or any other logging road in Oregon State Forests.

78. Defendants' unpermitted discharges of pollutants and/or industrial stormwater degrade the environment and the water quality of Oregon's water resources.

79. Defendants' unpermitted discharges of pollutants and/or industrial stormwater were avoidable had Defendants been diligent in overseeing and controlling operations, maintenance, monitoring, and compliance with federal law.

80. Defendants have benefited economically as a consequence of their unpermitted discharges of pollutants and/or industrial stormwater.

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81. Any and all additional violations by Defendants of the Clean Water Act, which occur or are discovered after those described in the Notice Letter and Second Notice Letter but before a final decision in this action, are continuing violations subject to this complaint.

82. Without the imposition of appropriate civil penalties and/or the issuance of an injunction and other relief, Defendants are likely to continue to violate the Clean Water Act to the further injury of Plaintiff, its members, and others.

VI. CAUSES OF ACTION

First Claim for Relief
(CWA claim against Defendants Brown, Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, Phillippi, Hampton Tree Farms, Incorporated, and Stimson Lumber Company)

83. Plaintiff hereby alleges and incorporates by reference all of the preceding paragraphs.

84. Defendants Brown, Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, Phillippi, Hampton Tree Farms, Incorporated, and Stimson Lumber Company are "persons" within the meaning of Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), and are subject to suit under the Act's citizen suit provision, 33 U.S.C. §1365.

85. Defendants Brown, Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, Phillippi, Hampton Tree Farms, Incorporated, and Stimson Lumber Company have violated and are violating Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§1311(a) and 1342, and an "effluent standard or limitation" as defined by Section 505 of the Act, 33 U.S.C. §1365, by discharging pollutants and/or industrial stormwater from point sources along the Trask River Road to waters of the United States without NPDES permits. These violations are ongoing, are described in part in part II.B. of the Notice Letter, and are hereby incorporated by reference as if fully set forth herein. *See* Exhibit 1.

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86. In addition to the violations described in the Notice Letter, Defendants Brown, Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, Phillippi, Hampton Tree Farms, Incorporated, and Stimson Lumber Company have violated Sections 301(a) and 402 of the CWA, 33 U.S.C. §§1311(a) and 1342, and an "effluent standard or limitation" as defined by Section 505 of the Act, 33 U.S.C. §1365, by discharging pollutants and/or industrial stormwater from point sources along the Trask River Road to waters of the United States without NPDES permits during the following periods:

Period of Violation	Daily Inches of Rainfall
9/18/06	0.71
9/15/06	0.20
9/14/06	0.28
7/30/06	0.24
6/18/06	0.43
6/17/06	0.43
6/16/06	0.20

Second Claim for Relief
(CWA claim against Defendants Brown, Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, Phillippi, Georgia-Pacific West, Incorporated, and Swanson Group, Incorporated)

87. Plaintiff hereby alleges and incorporates by reference all of the preceding paragraphs.

88. Defendants Brown, Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, Phillippi, Georgia-Pacific West, Incorporated, and Swanson Group, Incorporated, are "persons" within the meaning of Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), and are subject to suit under the Act's citizen suit provision, 33 U.S.C. §1365.

89. Defendants Brown, Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, Phillippi, Georgia-Pacific West, Incorporated, and Swanson Group, Incorporated, have violated and are violating Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§1311(a) and

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1342, and an "effluent standard or limitation" as defined by Section 505 of the Act, 33 U.S.C. §1365, by discharging pollutants and/or industrial stormwater from point sources along the Sam Downs Road to waters of the United States without NPDES permits. These violations are ongoing, are described in part in parts II.B. of the Notice Letter and Second Notice Letter, and are hereby incorporated by reference as if fully set forth herein. *See* Exhibits 1 & 2.

90. In addition to the violations described in the Notice Letter and Second Notice Letter, Defendants Brown, Hobbs, Craig, Snyder, Giustina, Heffernan, Hutchison, Phillippi, Georgia-Pacific West, Incorporated, and Swanson Group, Incorporated, have violated Sections 301(a) and 402 of the CWA, 33 U.S.C. §§1311(a) and 1342, and an "effluent standard or limitation" as defined by Section 505 of the Act, 33 U.S.C. §1365, by discharging pollutants and/or industrial stormwater from point sources along the Sam Downs Road to waters of the United States without NPDES permits during the following periods:

Period of Violation	Daily Inches of Rainfall
9/18/06	0.74
9/15/06	0.82
9/14/06	
8/30/06	0.13
7/12/06	0.58
6/16/06	0.15
6/15/06	0.12

Third Claim for Relief
(CWA claim against all Defendants)

91. Plaintiff hereby alleges and incorporates by reference all of the preceding paragraphs.

92. Defendants have violated and are violating Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§1311(a) and 1342, and an "effluent standard or limitation" as defined by Section 505 of the Act, 33 U.S.C. §1365, by failing to apply for NPDES permits for their

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discharges of pollutants and/or industrial stormwater from point sources along the Trask River Road, the Sam Downs Road, and other logging roads in Oregon State Forests. These violations are ongoing, are described in part in parts II.C. of the Notice Letter and Second Notice Letter, and are hereby incorporated by reference as if fully set forth herein. *See* Exhibits 1 & 2.

VII. RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

A. Issue injunctive relief requiring Defendants to apply for and obtain NPDES permits authorizing their discharges of pollutants and/or industrial stormwater from point sources along the Trask River Road, the Sam Downs Road, and other logging roads in Oregon State Forests;

B. Issue injunctive relief requiring Defendants to remediate the environmental damage and ongoing impacts resulting from their illegal discharges to the Trask and Kilchis River systems;

C. Issue injunctive relief requiring Defendants to develop and comply with appropriate quality assurance procedures to ensure future compliance with the Clean Water Act;

D. Issue injunctive relief ordering Defendants to provide Plaintiff, for a period beginning on the date of the Court's Order and running for two years after Defendants obtain NPDES permit coverage, with copies of all reports and other documents which Defendants submit to the EPA or to the ODEQ regarding Defendants' NPDES permits, at the time the reports or documents are submitted to these authorities;

E. Issue a declaratory judgment that Defendants have violated and continue to be in violation of the Clean Water Act;

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F. Assess civil penalties against Defendants Georgia-Pacific West, Incorporated, Hampton Tree Farms, Incorporated, Stimson Lumber Company, and Swanson Group, Incorporated, as authorized by Section 309(d) of the Act, 33 U.S.C. §1319(d);

G. Award Plaintiff its litigation expenses, including costs and reasonable attorneys' and expert witness fees, as authorized by Section 505(d) of the Act, 33 U.S.C. § 1365(d); and

H. Award such other relief as this Court deems just and appropriate.

RESPECTFULLY SUBMITTED this 20th day of September, 2006.

CASCADE RESOURCES ADVOCACY GROUP

By: /s/ Christopher G. Winter
Christopher G. Winter, OSB# 98435
Ralph Bloemers, OSB #98417

WASHINGTON FOREST LAW CENTER

By: /s/ Paul A. Kampmeier
Paul A. Kampmeier, WSBA #31560
Pro hac vice application pending

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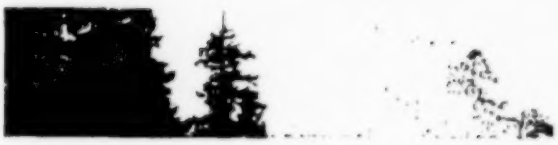

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June 19, 2006

Via Certified Mail - Return Receipt Requested

Mr. Marvin Brown, State Forester
Oregon Department of Forestry
2600 State Street
Salem, Oregon 97310

Mr. Stephen Hobbs, Ms. Barbara Craig, Ms. Diane Snyder
Mr. Larry Giustina, Mr. Chris Heffernan
Mr. William Hutchison, Ms. Jennifer Phillippi, Boardmembers
Oregon Board of Forestry
Oregon Department of Forestry
2600 State Street
Salem, Oregon 97301

Mr. Thomas Lee, President
Georgia Pacific West
133 Peachtree Street
Atlanta, Georgia 30303

Mr. Steven Zika, President & Registered Agent
Hampton Tree Farms
9600 SW Barnes Road, #200
Portland, Oregon 97225

Mr. Andrew Miller
Stimson Lumber Company
520 SW Yamhill Street, Suite 700
Portland, Oregon 97204

Mr. Steven Swanson, President & Registered Agent
Swanson Group Incorporated
2695 Glendale Valley Road
Glendale, Oregon 97442

Re: Notice of Intent to File Suit under the Clean Water Act.

Dear Sirs and Madams:

This letter provides each of you with sixty days' notice of the Northwest Environmental Defense Center's intent to file a citizen suit against you under Section 505 of the Clean Water Act, 33 U.S.C. §1365, for the Clean Water Act violations described herein. The Northwest Environmental Defense Center, 10015 SW Terwilliger Blvd., Portland, Oregon 97219, (503) 768-6673, is a non-profit organization dedicated to protecting the natural environment of the Pacific Northwest. Paul Kampmeier of the Washington Forest Law Center, 615 Second Avenue, Suite 360, Seattle, Washington 98104, (206) 223-4088 x 7, and Chris Winter of the Cascade Resources Advocacy Group, 917 SW Oak, Suite 417, Portland, Oregon 97205, (503) 525-2725, represent NEDC in this matter. Any response to this notice of intent to sue should be directed to counsel for NEDC.

Congress enacted the Clean Water Act in 1948 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). In doing so, Congress declared a national goal of eliminating discharges of pollutants to navigable waters by 1985. As described more fully in this letter, each of you have violated and are violating the Clean Water Act (see Sections 301 and 402 of the CWA, 33 U.S.C. §§1311 and 1342), by collecting, channeling, and then discharging stormwater associated with industrial activity and/or pollutants from logging roads to the South Fork Trask River, the Little South Fork of the Kilchis River, and other rivers and streams throughout Oregon State Forests.

I. BACKGROUND.

It is widely recognized that the construction, use, and existence of logging roads detrimentally affects stream health and aquatic habitat by increasing sediment delivery and stream turbidity, adversely affecting the survival of dozens of sensitive aquatic biota, including salmon, trout, other native fishes, amphibians, and macro-invertebrates. The adverse environmental effects from logging roads change over time and vary with road location within a watershed, soils, season of construction and use, weather, and other factors. Once roads are built there is also variability based on road use and maintenance practices. What remain constant, however, are the negative impacts to water quality, salmon and other aquatic species.

A. Roads are a main source of sediment affecting aquatic systems.

Forestry-related sediment is the fifth leading source of water quality impairment to rivers and streams nationwide and sedimentation and siltation from all land uses is the leading cause of degraded wetland integrity (USEPA, 2000). In the western United States, roads are the primary source of sediment from forest management activities (Megahan and Ketcheson, 1996). Much forestry-related sediment is delivered episodically via stormwater runoff or road-related landslides. Roads, road construction and logging all cumulatively elevate peak flows, erosion, sediment delivery, turbidity, and sedimentation (Meehan, 1991; Rhodes et al., 1994; UFSF and USBLM, 1997a; Beschta et al., 2004).

Historically, logging roads were intentionally designed to discharge stormwater directly into streams—logging roads utilize ditches, channels, and culverts to move stormwater off the road and into the existing stream network. More recent design standards acknowledge that direct discharges are ecologically undesirable and seek to direct drainage onto porous forest soils for infiltration. However, most forest roads in Oregon were constructed prior to state rules that marginally improved construction standards (ODF Issue Paper, 2000). Consequently, a significant amount of the road networks in most watersheds remain hydrologically connected to streams (Wemple et al., 1996; Rhodes and Huntington, 2000).

Drainage points from logging roads include culverts and cross drains; live stream crossings; waterbars; rolling dips; grade breaks; saddles; and random points of discharge. Roads located on steep slopes or next to streams pose the greatest risk of sediment delivery and adverse impacts to stream habitats. Moreover, "the single greatest factor affecting generation of sediment from road surfaces is the amount of traffic" (Reid and Dunne, 1984). The greater the disturbance area and the closer to streams, the greater the risk of sediment delivery.

B. Logging roads in Oregon discharge stormwater and sediment to streams.

A 1996 Oregon Department for Forestry monitoring report concluded that between 29-39% of active and inactive roads on state and private lands have the potential to deliver sediment to streams (ODF, 1996). This project also found a general lack of stormwater filtering near streams. Other studies confirm the breadth of sediment and stormwater discharges from forest roads in the Pacific Northwest. In one study, 31% of the surveyed road length in five Oregon regions was rated as certain (25%) or possible (6%) to deliver sediment to streams (Skaugset and Allen, 1998). The Skaugset and Allen study likely underestimates the amount of road length contributing sediment to streams because it assumes that all culverts function properly, when in fact contributing road length increases dramatically during large storm events when some culverts fail.

In a separate western Washington study area 75% of road drainage was discharging directly to streams (Reid and Dunne, 1984). Other studies have found that 34% of road drainage points flowed directly to stream channels (Bilby et al., 1989) and that 57.3% of road drainage in the Blue River area in the western Cascades of Oregon delivered either to channels or gullies (Wemple, 1994). Valley bottom roads generally have the highest proportion of road segments connected to streams, although many more miles of upland roads are hydrologically connected to streams.

A recent road-sediment study in the Kilchis watershed in the Tillamook State Forest found that 25-39% of the road system was delivering sediment to streams (ODF, 1997). Although some experts believe the Kilchis numbers underestimate the scope of the problem, even the Kilchis study noted a positive delivery of sediment to stream channels from 459 different discharge points along nearly 42 miles of road. An astounding 224 of the identified discharge points were "live stream culverts"—locations where stormwater ditches joined a flowing stream that then flowed through a culvert underneath a road. Indeed, although Oregon forest practices regulations have since 1978 required operators to locate stormwater management

mechanisms so that stormwater is filtered before entering waters of the state, the Kilchis report found that roads in western Oregon generally, and in the Kilchis watershed specifically, "are not in the condition suggested by this rule". The report ultimately concluded "that [the] roads are designed and maintained for efficient delivery of water to channels."

Conditions on the Trask River are equally troubling. According to the 1998 Trask Watershed Assessment, completed as part of the Tillamook Bay National Estuary Project, the 2.6 miles of road per square mile in the South Fork Trask sub-watershed indicates an elevated risk of erosion due to roads (TBNEP, 1998a). In the South Fork sub-watershed alone there are reported to be approximately 12.6 miles of road contributing sediment to streams; the South Fork is one of two sub-watersheds with the highest area of potential road erosion. The Oregon Department of Environmental Quality confirms the problem and lists the mainstem of the Trask as a waterbody of concern for turbidity and sediment due to an increase in erosion caused by forest roads.

C. Sediment from logging roads diminishes water quality and negatively impacts the habitat of fish, amphibians, and other aquatic species.

Roads have many physical and biological effects that can severely and permanently harm streams and their biota (Furniss et al., 1992; Trombulak and Frissell, 2000; Gucinski et al., 2001). Increased erosion and corresponding increases in sediment delivery and sedimentation contribute to channel simplification, including losses in the depth, frequency, and quality of pools and off-channel habitat critical for fish rearing. Increased sedimentation also contributes to increased levels of fine sediment, which greatly reduces salmonid survival from egg-to-fry life stages. Elevated sediment delivery also increases turbidity that can impair salmonid sight-feeding and cause gill damage—both factors that can contribute to indirect mortality (Rhodes et al., 1994; Lloyd et al., 1987; Newcombe and Jensen, 1996; Wood, 1997).

As noted in the Kilchis Watershed Analysis:

> The negative effects of increased sediment generation include: fine sediment deposition in spawning gravels that can smother salmonid eggs, reduce[d] intergravel oxygen, increased turbidity in the water column that can interfere with sight-feeding by salmonids, direct burial of macroinvertebrate insects and their habitat, and bed aggradation throughout the stream network including accumulation of sediment in low gradient channels causing bank erosion and impairing navigation (TBNEP, 1998b).

Increases in sediment delivery also contribute to increases in width/depth ratios in sensitive streams (Richards, 1982; Rhodes et al., 1994), which inevitably increases summer water temperatures even in the absence of the loss of shade (Beschta et al., 1987; McCullough, 1999).

The most well-known native aquatic species affected by turbidity and sedimentation are salmon and trout; Oregon state lands support coho, chinook, and chum salmon, steelhead, and

cutthroat and rainbow trout. There are also twenty other fishes known or likely to exist in the Tillamook and Clatsop State Forests that are potentially affected by sediment delivery.[1] Additionally, nineteen potentially-affected amphibians are known to exist or likely exist on northwest Oregon state lands.[2]

Indeed, both the Trask and Kilchis Rivers support fish species that are in decline, face significant ecological challenges, or are listed as "species of concern". On the Trask River, Pacific and River Lamprey, coastal cutthroat trout, and chum salmon are all considered "species of concern". Coho salmon and winter steelhead trout have also been listed or proposed for listing under the federal Endangered Species Act. The Kilchis Watershed Analysis notes that only one of the five Tillamook Basin salmonid populations is currently healthy and that the forested upland has been greatly altered by forestry and timber harvest.

Under the state's water quality standards, these species and their habitat are beneficial uses that must be fully protected. The State of Oregon's biological criteria require that water quality must be sufficient to prevent detrimental changes in all resident biological communities, OAR 340-41-0011, including macro-invertebrate communities that often constitute the food source for aquatic species. Yet despite these rules and the acknowledged serious impacts of logging roads, logging road pollution continues to negatively impact water quality and the habitat of fish, amphibians, and other aquatic species on state forest lands.

II. CLEAN WATER ACT VIOLATIONS.

A. Legal background and requirements.

Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), prohibits the point source discharge of pollutants to navigable waters of the United States unless the discharge is in compliance with a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. §1342. Additionally, as required by Section 402(p) of the Clean Water Act, 33 U.S.C. §1342(p), U.S. EPA regulations require NPDES permits for stormwater discharges associated with industrial activity such as logging. 40 C.F.R. 122.26. Point source discharges of industrial stormwater and/or pollutants from forest roads are therefore illegal unless they are in compliance with an NPDES permit.

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[1] These are: Pacific lamprey; Brook lamprey; River lamprey; Coast Range sculpin; Mottled sculpin; Torrent sculpin; Reticulated sculpin; Riffle sculpin; Prickly sculpin; Paiute sculpin; Tui chub; Oregon chub; Northern squawfish; Speckled dace; Longnose dace; Leopard dace; Redside-shiner; Pearmouth; Largescale sucker; and Three-spine stickleback (ODF, 2001).

[2] These are: Northwestern salamander; Long-toed salamander; Cope's giant salamander; Pacific giant salamander; Cascade torrent salamander; Columbia torrent salamander; Southern torrent salamander; Clouded salamander; Oregon slender salamander; Ensatina; Dunn's salamander; Western red-backed salamander; Roughskin newt; Tailed frog; Pacific treefrog; Red-legged frog; Foothill yellow-legged frog; Cascades frog; and Oregon spotted frog (ODF, 2001).

The EPA regulation defining the term "silvicultural point source" does not exempt point source discharges of industrial stormwater and/or pollutants from the requirement to have an NPDES permit. 40 C.F.R. 122.27. The Ninth Circuit Court of Appeals recently held that 40 C.F.R. 122.27 only excludes nonpoint source silvicultural activities from NPDES permit requirements but does not exempt point source discharges like the aerial application of pesticides. *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1186 (9th Cir. 2002). More recently, a federal district court in California held that conduits and channels associated with a timber company's stormwater runoff collection system need NPDES permits if they meet the statutory definition of "point source". *Environmental Protection Information Center v. Pacific Lumber Company*, 301 F.Supp.2d 1102, 1113 (N.D. Cal. 2004).

B. Unpermitted discharges.

Each of you have violated Section 301(a) of the Clean Water Act and EPA's industrial stormwater regulations by discharging stormwater associated with industrial activity and/or pollutants from point sources along logging roads in Oregon State Forests to navigable waters of the United States without an NPDES permit. Specifically, you have routinely built, maintained, and/or utilized systems of ditches, culverts, channels, and other mechanisms that are designed to and do collect, channel, and discharge industrial stormwater and/or pollutants from logging roads to navigable waters of the United States on each and every day during which there was 0.12 inches or more of precipitation. These unpermitted discharges occur on the logging roads described below and on roads throughout Oregon State Forests. These unpermitted discharges violate the Clean Water Act and are ongoing.

Example #1: The Trask River Road.

Along the section of the Trask River Road that generally runs along the west side of the South Fork Trask River, between the first bridge that crosses the South Fork Trask River south of the North Fork Trask River[3] and the confluence of the South Fork Trask River and Edwards Creek, Hampton Tree Farms, the Stimson Lumber Company, the Swanson Group Incorporated, the Oregon Board of Forestry, the Oregon State Forester, and the Oregon Department of Forestry have utilized a network of ditches, channels, culverts, and other mechanisms to collect, channel, and then discharge stormwater associated with industrial activity and/or pollutants to unnamed streams and the South Fork Trask River, which are tributary to the Trask River and Tillamook Bay. The locations of the point sources from which you are discharging include:

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[3] The bridge marking the north end of the road section at issue is apparently unnamed. The bridge appears to be the first bridge to cross the South Fork Trask River south of the junction of the Trask River Road and the North Fork Trask River Road (or south of the confluence of the north and south forks of the Trask River). The bridge is approximately 0.65 miles before the Trask River Road junctions with the East Fork Trask Road and approximately 1 mile before the Trask River Road junctions with the Edwards Creek Road. Hereafter this bridge will be referred to as the South Fork Bridge. See Appendix 1 for a map showing the approximate location of the Trask River Road section at issue.

- At the west end of the South Fork Bridge, stormwater and/or pollutants are collected in the adjacent parking area and channelized through gullies and ditches down the river bank and into the South Fork Trask River (Trask 1a);

- Immediately upstream (south) of the South Fork Bridge, stormwater and/or pollutants are collected on both sides of the Trask River Road and then routed through ditches and a culvert, down the river bank, and into the South Fork Trask River (Trask 1b);

- Approximately 0.4 miles south of the South Fork Bridge, stormwater and/or pollutants that have been collected and channelized along the side of the road are discharged to an unnamed stream flowing down the hillside, which is tributary to the South Fork Trask River via a culvert under the road (Trask 2);

- Approximately 0.5 miles south of the South Fork Bridge, stormwater and/or pollutants are collected and channelized via a ditch on the river side of the road and then dumped down the river bank and directly into the South Fork Trask River (Trask 3);

- Approximately 0.65 miles south of the South Fork Bridge—at the junction of the East Fork Trask Road and the Trask River Road where there is a bridge crossing the South Fork Trask River, an information sign, and a sign for Lake Tahoe—multiple ditches and channels collect and drain stormwater and/or pollutants to a small stream and to the South Fork Trask River. Specifically,
  a) At the bridge and across the Trask River Road from the bridge, roadside stormwater collection ditches discharge to a small stream that is tributary to the South Fork Trask River via a culvert and ditch (Trask 4a);
  b) Just upstream of the junction of the East Fork Trask Road and the Trask River Road, stormwater and/or pollutants are collected and channelized on the river side of the road and then discharged down the river bank and directly into the South Fork Trask River (Trask 4b); and

- Approximately one mile south of the South Fork Bridge, on the Trask River Road before the junction with the Edwards Creek Road and just before the yellow 1.0 mile marker, roadside stormwater collection ditches discharge stormwater and/or pollutants directly, and via a culvert under the road, to the South Fork Trask River (Trask 5).

You—Hampton Tree Farms, the Stimson Lumber Company, the Swanson Group Incorporated, the Oregon Board of Forestry, the Oregon State Forester, and the Oregon Department of Forestry—have violated Section 301(a) of the Clean Water Act by discharging stormwater associated with industrial activity and/or pollutants from these point sources on the following days:

Table 1: Total Suspended Solids (TSS)

Period of Violation	Discharge Location	Receiving Water TSS (mg/L)	Discharge TSS (mg/L)	Number of Times Over Background
5/23/06	Trask 1a	3.5	250	71
5/23/06	Trask 1b	3.0	270	90
5/23/06	Trask 2		13	
5/23/06	Trask 3	4.5	54	12
5/23/06	Trask 4a	4.0	76	19
4/15/06	Trask 1a	Non-detect	1100	1100
4/15/06	Trask 1b	4.0	68	17
4/14/06	Trask 1a	8.0	2900	363
4/14/06	Trask 1b	Non-detect	560	560
4/14/06	Trask 2	3.0	340	113
4/14/06	Trask 3	Non-detect	3400	3400
4/14/06	Trask 4a	Non-detect	280	280
4/14/06	Trask 5	Non-detect	230	230
4/10/06	Trask 3	Non-detect	2700	2700

Table 2: Turbidity

Period of Violation	Discharge Location	Receiving Water Turbidity (NTU)	Discharge Turbidity (NTU)	Number of Times Over Background
5/23/06	Trask 1a	2.6	320	123
5/23/06	Trask 1b	9.7	800	82
5/23/06	Trask 2		18	
5/23/06	Trask 3	4.0	150	38
5/23/06	Trask 4a	4.7	240	51
4/15/06	Trask 1a	1.2	1100	917
4/15/06	Trask 1b	2.0	98	49
4/14/06	Trask 1a	3.5	3400	971
4/14/06	Trask 1b	9.6	1600	167
4/14/06	Trask 2	8.5	660	78
4/14/06	Trask 3	3.9	3600	923
4/14/06	Trask 4a	9.1	690	76
4/14/06	Trask 5	3.2	650	203

Additionally, you—Hampton Tree Farms, the Stimson Lumber Company, the Swanson Group Incorporated, the Oregon Board of Forestry, the Oregon State Forester, and the Oregon Department of Forestry—have violated Section 301(a) of the Clean Water Act by discharging stormwater associated with industrial activity and/or pollutants to unnamed streams and the South Fork Trask river from the above-described point sources on each and every day during

which there was 0.12 inches or more of precipitation, as indicated in the table attached to this letter at Appendix 3.

Example #2: The Sam Downs Road.

Along the Sam Downs Road,[4] Georgia Pacific West, the Oregon Board of Forestry, the Oregon State Forester, and the Oregon Department of Forestry have utilized a network of ditches, channels, culverts, and other mechanisms to collect, channel, and then discharge stormwater associated with industrial activity and/or pollutants to unnamed streams and the Little South Fork of the Kilchis River, which are tributary to the Kilchis River and Tillamook Bay. The locations of the point sources from which you are discharging include:

- Approximately 2.2 miles past the yellow ½ mile marker that is on the section of the Kilchis River Road that runs along the south and east side of the Kilchis River (the yellow ½ mile marker is past (east of) the Kilchis River/Mapes Creek boat ramp), roadside stormwater collection ditches discharge to a stream that then runs through a black plastic culvert under the road and down the riverbank to the Little South Fork of the Kilchis River (SD 1);

- Approximately 2.35 miles past the yellow ½ mile marker on the Kilchis River Road, roadside stormwater collection ditches discharge to a stream that then runs through a metal culvert under the road and down the riverbank to the Little South Fork of the Kilchis River (SD 2);

- Approximately 2.9 miles past the yellow ½ mile marker on the Kilchis River Road, just upstream of the smolt trap, roadside stormwater collection ditches discharge through a culvert under the road and then through a ditch to the Little South Fork of the Kilchis River (SD 3);

- Approximately 3.4 miles past the yellow ½ mile marker on the Kilchis River Road, roadside stormwater collection ditches discharge through culverts under the road and then dump stormwater and/or pollutants down the steep hillside and riverbank to the Little South Fork of the Kilchis River (SD 4); and

- Approximately 3.6 miles past the yellow ½ mile marker on the Kilchis River Road, there are two culverts with diffusers—the first black plastic and the second metal—dumping stormwater and/or pollutants down the hillside and riverbank to the Kilchis River (SD 5).

You—Georgia Pacific West, the Oregon Board of Forestry, the Oregon State Forester, and the Oregon Department of Forestry—have violated Section 301(a) of the Clean Water Act by discharging stormwater associated with industrial activity and/or pollutants from these point sources on the following days:

---

[4] See Appendix 2 for a map showing the approximate location of the Sam Downs Road section at issue.

Table 1: Total Suspended Solids (TSS)

Period of Violation	Discharge Location	Receiving Water TSS (mg/L)	Discharge TSS (mg/L)	Number of Times Over Background
4/15/06	SD 1	Non-detect	260	260
4/15/06	SD 2	Non-detect	210	210
4/15/06	SD 3	2.0	68	34
4/15/06	SD 5	Non-detect	45	45
3/17/06	SD 1	Non-detect	44	44
3/17/06	SD 2	Non-detect	100	100
3/17/06	SD 3		14	

Table 2: Turbidity

Period of Violation	Discharge Location	Receiving Water Turbidity (NTU)	Discharge Turbidity (NTU)	Number of Times Over Background
4/15/2006	SD 1	6.6	750	114
4/15/2006	SD 2	5.3	870	164
4/15/2006	SD 3	2.1	240	114
4/15/2006	SD 5	1.6	82	51

Additionally, you—Georgia Pacific West, the Oregon Board of Forestry, the Oregon State Forester, and the Oregon Department of Forestry—have violated Section 301(a) of the Clean Water Act by discharging stormwater associated with industrial activity and/or pollutants from the above-described point sources on each and every day during which there was 0.12 inches or more of precipitation, as indicated in the table attached to this letter at Appendix 4.

C. Failure to Apply for NPDES Permits.

Federal and state regulations require any person who discharges or proposes to discharge pollutants to navigable waters of the United States to apply for an NPDES permit. 40 C.F.R. 122.21(a); OAR 340-045-0015(2) & (5). Additionally, federal and state regulations require dischargers of stormwater associated with industrial activity to apply for an individual permit or seek coverage under a promulgated stormwater general permit before commencing a discharge. 40 C.F.R. 122.26(c) & (e)(1)(i); OAR 340-045-0015(2) & (5). Each of you have violated these requirements by failing to apply for NPDES permits, and by failing to do so by required deadlines, for each and every location where you discharge stormwater associated with industrial activity and/or pollutants from point sources associated with logging roads to navigable waters of the United States in Oregon State Forests.

III. NEDC'S INTENT TO FILE SUIT.

The above-described violations reflect only what information currently available to NEDC indicates. All of the violations described in this notice of intent to sue are ongoing. NEDC

intends to sue for all violations on all logging roads in Oregon state forests, including those yet to be discovered or identified and those committed subsequent to the date of this notice of intent to sue.

Under Section 309(d) of the Clean Water Act, 33 U.S.C. §1319(d), each of the above-described violations subjects the violator to a penalty of up to $27,500 or $32,500 per day. In addition to civil penalties, under Sections 505(a) and (d) of the CWA, 33 U.S.C. §§1365(a) and (d), NEDC will seek injunctive relief to prevent further violations and such other relief as is permitted by law. Under Section 505(d) of the CWA, 33 U.S.C. §1365(d), NEDC will also seek recovery of the costs of litigation, including attorneys' and expert witness fees.

NEDC believes that this notice of intent to sue sufficiently states grounds for filing suit. We intend, at the close of the 60-day notice period or shortly thereafter, to file a citizen suit against you under Section 505(a) of the Clean Water Act for these and any and all similar violations.

During the 60-day notice period, we would be willing to discuss settlement terms and effective remedies for the violations in this letter. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within 10 days of receiving this notice so that a meeting can be arranged and negotiations completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint if discussions are continuing when the notice period ends.

Very truly yours,

Washington Forest Law Center

By: _____
Paul A. Kampmeier

Cascade Resources Advocacy Group

By: _____
Chris Winter

cc: Stephen L. Johnson, Administrator, U.S. EPA
L. Michael Bogert, Regional Administrator, U.S. EPA Region 10
Stephanie Hallock, Director, Oregon Department of Environmental Quality
Registered Agent for Georgia Pacific West, Ct Corporation System, 388 State Street, Suite 420, Salem, Oregon 97301
Registered Agent for Stimson Lumber Company, TT Administrative Services, LLC, 888 SW Fifth Avenue, Suite 1600, Portland, Oregon 97204

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July 21, 2006

Via Certified Mail - Return Receipt Requested

Mr. Steven Swanson, President & Registered Agent
Swanson Group Incorporated
2695 Glendale Valley Road
Glendale, Oregon 97442

Re: Notice of Intent to File Suit under the Clean Water Act.

Dear Mr. Swanson:

This letter provides you and Swanson Group Incorporated with sixty days' notice of the Northwest Environmental Defense Center's intent to file a citizen suit against Swanson Group Incorporated under Section 505 of the Clean Water Act, 33 U.S.C. §1365, for the Clean Water Act violations described herein. The Northwest Environmental Defense Center, 10015 SW Terwilliger Blvd., Portland, Oregon 97219, (503) 768-6673, is a non-profit organization dedicated to protecting the natural environment of the Pacific Northwest. Paul Kampmeier of the Washington Forest Law Center, 615 Second Avenue, Suite 360, Seattle, Washington 98104, (206) 223-4088 x 7, and Chris Winter of the Cascade Resources Advocacy Group, 917 SW Oak, Suite 417, Portland, Oregon 97205, (503) 525-2725, represent NEDC in this matter. This letter corrects the notice letter sent to you on June 19, 2006 and alleges illegal discharges of stormwater associated with industrial activity and/or pollutants from the Sam Downs Road in Tillamook County, Oregon. Any response to this notice of intent to sue should be directed to counsel for NEDC.

Congress enacted the Clean Water Act in 1948 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). In doing so, Congress declared a national goal of eliminating discharges of pollutants to navigable waters by 1985. As described more fully in this letter, Swanson Group Incorporated has violated and is violating the Clean Water Act (see Sections 301 and 402 of the CWA, 33 U.S.C. §§1311 and 1342), by collecting, channeling, and then discharging stormwater associated with industrial activity and/or pollutants from the Sam Downs Road to unnamed streams, the Little South Fork of the Kilchis River, the Kilchis River and Tillamook Bay.

a nonprofit corporation providing legal services for forest cases of statewide significance

PHOTOGRAPHY COURTESY ART WOLFE, INC. PRINTED ON 100% RECYCLED PAPER WITH VEGETABLE-BASED INKS

I. BACKGROUND.

It is widely recognized that the construction, use, and existence of logging roads detrimentally affects stream health and aquatic habitat by increasing sediment delivery and stream turbidity, adversely affecting the survival of dozens of sensitive aquatic biota, including salmon, trout, other native fishes, amphibians, and macro-invertebrates. The adverse environmental effects from logging roads change over time and vary with road location within a watershed, soils, season of construction and use, weather, and other factors. Once roads are built there is also variability based on road use and maintenance practices. What remain constant, however, are the negative impacts to water quality, salmon and other aquatic species.

A. Roads are a main source of sediment affecting aquatic systems.

Forestry-related sediment is the fifth leading source of water quality impairment to rivers and streams nationwide and sedimentation and siltation from all land uses is the leading cause of degraded wetland integrity (USEPA, 2000). In the western United States, roads are the primary source of sediment from forest management activities (Meehan and Ketcheson, 1996). Much forestry-related sediment is delivered episodically via stormwater runoff or road-related landslides. Roads, road construction and logging all cumulatively elevate peak flows, erosion, sediment delivery, turbidity, and sedimentation (Meehan, 1991; Rhodes et al., 1994; UFSF and USBLM, 1997a; Beschta et al., 2004).

Historically, logging roads were intentionally designed to discharge stormwater directly into streams—logging roads utilize ditches, channels, and culverts to move stormwater off the road and into the existing stream network. More recent design standards acknowledge that direct discharges are ecologically undesirable and seek to direct drainage onto porous forest soils for infiltration. However, most forest roads in Oregon were constructed prior to state rules that marginally improved construction standards (ODF Issue Paper, 2000). Consequently, a significant amount of the road networks in most watersheds remain hydrologically connected to streams (Wemple et al., 1996; Rhodes and Huntington, 2000).

Drainage points from logging roads include culverts and cross drains; live stream crossings; waterbars; rolling dips; grade breaks; saddles; and random points of discharge. Roads located on steep slopes or next to streams pose the greatest risk of sediment delivery and adverse impacts to stream habitats. Moreover, "the single greatest factor affecting generation of sediment from road surfaces is the amount of traffic" (Reid and Dunne, 1984). The greater the disturbance area and the closer to streams, the greater the risk of sediment delivery.

B. Logging roads in Oregon discharge stormwater and sediment to streams.

A 1996 Oregon Department for Forestry monitoring report concluded that between 29-39% of active and inactive roads on state and private lands have the potential to deliver sediment to streams (ODF, 1996). This project also found a general lack of stormwater filtering near streams. Other studies confirm the breadth of sediment and stormwater discharges from forest roads in the Pacific Northwest. In one study, 31% of the surveyed road length in five Oregon

regions was rated as certain (25%) or possible (6%) to deliver sediment to streams (Skaugset and Allen, 1998). The Skaugset and Allen study likely underestimates the amount of road length contributing sediment to streams because it assumes that all culverts function properly, when in fact contributing road length increases dramatically during large storm events when some culverts fail.

In a separate western Washington study area 75% of road drainage was discharging directly to streams (Reid and Dunne, 1984). Other studies have found that 34% of road drainage points flowed directly to stream channels (Bilby et al., 1989) and that 57.3% of road drainage in the Blue River area in the western Cascades of Oregon delivered either to channels or gullies (Wemple, 1994). Valley bottom roads generally have the highest proportion of road segments connected to streams, although many more miles of upland roads are hydrologically connected to streams.

A recent road-sediment study in the Kilchis watershed in the Tillamook State Forest found that 25-39% of the road system was delivering sediment to streams (ODF, 1997). Although some experts believe the Kilchis numbers underestimate the scope of the problem, even the Kilchis study noted a positive delivery of sediment to stream channels from 459 different discharge points along nearly 42 miles of road. An astounding 224 of the identified discharge points were "live stream culverts"—locations where stormwater ditches joined a flowing stream that then flowed through a culvert underneath a road. Indeed, although Oregon forest practices regulations have since 1978 required operators to locate stormwater management mechanisms so that stormwater is filtered before entering waters of the state, the Kilchis report found that roads in western Oregon generally, and in the Kilchis watershed specifically, "are not in the condition suggested by this rule". The report ultimately concluded "that [the] roads are designed and maintained for efficient delivery of water to channels."

Conditions on the Trask River are equally troubling. According to the 1998 Trask Watershed Assessment, completed as part of the Tillamook Bay National Estuary Project, the 2.6 miles of road per square mile in the South Fork Trask sub-watershed indicates an elevated risk of erosion due to roads (TBNEP, 1998a). In the South Fork sub-watershed alone there are reported to be approximately 12.6 miles of road contributing sediment to streams; the South Fork is one of two sub-watersheds with the highest area of potential road erosion. The Oregon Department of Environmental Quality confirms the problem and lists the mainstem of the Trask as a waterbody of concern for turbidity and sediment due to an increase in erosion caused by forest roads.

C. Sediment from logging roads diminishes water quality and negatively impacts the habitat of fish, amphibians, and other aquatic species.

Roads have many physical and biological effects that can severely and permanently harm streams and their biota (Furniss et al., 1992; Trombulak and Frissell, 2000; Gucinski et al., 2001). Increased erosion and corresponding increases in sediment delivery and sedimentation contribute to channel simplification, including losses in the depth, frequency, and quality of pools and off-channel habitat critical for fish rearing. Increased sedimentation also

contributes to increased levels of fine sediment, which greatly reduces salmonid survival from egg-to-fry life stages. Elevated sediment delivery also increases turbidity that can impair salmonid sight-feeding and cause gill damage—both factors that can contribute to indirect mortality (Rhodes et al., 1994; Lloyd et al., 1987; Newcombe and Jensen, 1996; Wood, 1997).

As noted in the Kilchis Watershed Analysis:

> The negative effects of increased sediment generation include: fine sediment deposition in spawning gravels that can smother salmonid eggs, reduce[d] intergravel oxygen, increased turbidity in the water column that can interfere with sight-feeding by salmonids, direct burial of macroinvertebrate insects and their habitat, and bed aggradation throughout the stream network including accumulation of sediment in low gradient channels causing bank erosion and impairing navigation (TBNEP, 1998b).

Increases in sediment delivery also contribute to increases in width/depth ratios in sensitive streams (Richards, 1982; Rhodes et al., 1994), which inevitably increases summer water temperatures even in the absence of the loss of shade (Beschta et al., 1987; McCullough, 1999).

The most well-known native aquatic species affected by turbidity and sedimentation are salmon and trout; Oregon state lands support coho, chinook, and chum salmon, steelhead, and cutthroat and rainbow trout. There are also twenty other fishes known or likely to exist in the Tillamook and Clatsop State Forests that are potentially affected by sediment delivery.[1] Additionally, nineteen potentially-affected amphibians are known to exist or likely exist on northwest Oregon state lands.[2]

Indeed, both the Trask and Kilchis Rivers support fish species that are in decline, face significant ecological challenges, or are listed as "species of concern". On the Trask River, Pacific and River Lamprey, coastal cutthroat trout, and chum salmon are all considered "species of concern". Coho salmon and winter steelhead trout have also been listed or proposed for listing under the federal Endangered Species Act. The Kilchis Watershed Analysis notes that only one of the five Tillamook Basin salmonid populations is currently healthy and that the forested upland has been greatly altered by forestry and timber harvest.

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[1] These are: Pacific lamprey; Brook lamprey; River lamprey; Coast Range sculpin; Mottled sculpin; Torrent sculpin; Reticulated sculpin; Riffle sculpin; Prickly sculpin; Paiute sculpin; Tui chub; Oregon chub; Northern squawfish; Speckled dace; Longnose dace; Leopard dace; Redside-shiner; Peamouth; Largescale sucker; and Three-spine stickleback (ODF, 2001).

[2] These are: Northwestern salamander; Long-toed salamander; Cope's giant salamander; Pacific giant salamander; Cascade torrent salamander; Columbia torrent salamander; Southern torrent salamander; Clouded salamander; Oregon slender salamander; Ensatina; Dunn's salamander; Western red-backed salamander; Roughskin newt; Tailed frog; Pacific treefrog; Red-legged frog; Foothill yellow-legged frog; Cascades frog; and Oregon spotted frog (ODF, 2001).

Under the state's water quality standards, these species and their habitat are beneficial uses that must be fully protected. The State of Oregon's biological criteria require that water quality must be sufficient to prevent detrimental changes in all resident biological communities, OAR 340-41-0011, including macro-invertebrate communities that often constitute the food source for aquatic species. Yet despite these rules and the acknowledged serious impacts of logging roads, logging road pollution continues to negatively impact water quality and the habitat of fish, amphibians, and other aquatic species on state forest lands.

II. CLEAN WATER ACT VIOLATIONS.

A. Legal background and requirements.

Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), prohibits the point source discharge of pollutants to navigable waters of the United States unless the discharge is in compliance with a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. §1342. Additionally, as required by Section 402(p) of the Clean Water Act, 33 U.S.C. §1342(p), U.S. EPA regulations require NPDES permits for discharges of stormwater associated with industrial activity such as logging. 40 C.F.R. 122.26. Point source discharges of industrial stormwater and/or pollutants from forest roads are therefore illegal unless they are in compliance with an NPDES permit.

The EPA regulation defining the term "silvicultural point source" does not exempt point source discharges of industrial stormwater and/or pollutants from the requirement to have an NPDES permit. 40 C.F.R. 122.27. The Ninth Circuit Court of Appeals recently held that 40 C.F.R. 122.27 only excludes nonpoint source silvicultural activities from NPDES permit requirements but does not exempt point source discharges like the aerial application of pesticides. *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1186 (9th Cir. 2002). More recently, a federal district court in California held that conduits and channels associated with a timber company's stormwater runoff collection system need NPDES permits if they meet the statutory definition of "point source". *Environmental Protection Information Center v. Pacific Lumber Company*, 301 F.Supp.2d 1102, 1113 (N.D. Cal. 2004).

B. Unpermitted discharges.

Swanson Group Incorporated has violated Section 301(a) of the Clean Water Act and EPA's industrial stormwater regulations by discharging stormwater associated with industrial activity and/or pollutants from point sources along the Sam Downs Road to navigable waters of the United States without an NPDES permit. These unpermitted discharges violate the Clean Water Act and are ongoing.

Specifically, along the Sam Downs Road,[3] Swanson Group Incorporated has built, maintained, and/or utilized a network of ditches, channels, culverts, and other mechanisms to collect, channel, and then discharge stormwater associated with industrial activity and/or pollutants to unnamed streams and the Little South Fork of the Kilchis River, which are

[3] See Appendix 1 for a map showing the approximate location of the Sam Downs Road section at issue.

tributary to the Kilchis River and Tillamook Bay. The locations of the point sources from which Swanson Group Incorporated is discharging include:

- Approximately 2.2 miles past the yellow ½ mile marker that is on the section of the Kilchis River Road that runs along the south and east side of the Kilchis River (the yellow ½ mile marker is past (east of) the Kilchis River/Mapes Creek boat ramp), roadside stormwater collection ditches discharge to a stream that then runs through a black plastic culvert under the road and down the riverbank to the Little South Fork of the Kilchis River (SD 1);

- Approximately 2.35 miles past the yellow ½ mile marker on the Kilchis River Road, roadside stormwater collection ditches discharge to a stream that then runs through a metal culvert under the road and down the riverbank to the Little South Fork of the Kilchis River (SD 2);

- Approximately 2.9 miles past the yellow ½ mile marker on the Kilchis River Road, just upstream of the smolt trap, roadside stormwater collection ditches discharge through a culvert under the road and then through a ditch to the Little South Fork of the Kilchis River (SD 3);

- Approximately 3.4 miles past the yellow ½ mile marker on the Kilchis River Road, roadside stormwater collection ditches discharge through culverts under the road and then dump stormwater and/or pollutants down the steep hillside and riverbank to the Little South Fork of the Kilchis River (SD 4); and

- Approximately 3.6 miles past the yellow ½ mile marker on the Kilchis River Road, there are two culverts with diffusers—the first black plastic and the second metal—dumping stormwater and/or pollutants down the hillside and riverbank to the Kilchis River (SD 5).

Swanson Group Incorporated has violated Section 301(a) of the Clean Water Act by discharging stormwater associated with industrial activity and/or pollutants from these point sources on the following days:

Table 1: Total Suspended Solids (TSS)

Period of Violation	Discharge Location	Receiving Water TSS (mg/L)	Discharge TSS (mg/L)	Number of Times Over Background
4/15/06	SD 1	Non-detect	260	260
4/15/06	SD 2	Non-detect	210	210
4/15/06	SD 3	2.0	68	34
4/15/06	SD 5	Non-detect	45	45
3/17/06	SD 1	Non-detect	44	44
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Table 2: Turbidity

Period of Violation	Discharge Location	Receiving Water Turbidity (NTU)	Discharge Turbidity (NTU)	Number of Times Over Background
4/15/2006	SD 1	6.6	750	114
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4/15/2006	SD 5	1.6	82	51

Additionally, Swanson Group Incorporated has violated Section 301(a) of the Clean Water Act by discharging stormwater associated with industrial activity and/or pollutants from the above-described point sources on each and every day during which there was 0.12 inches or more of precipitation, as indicated in the table attached to this letter at Appendix 2.

C. Failure to Apply for NPDES Permits.

Federal and state regulations require any person who discharges or proposes to discharge pollutants to navigable waters of the United States to apply for an NPDES permit. 40 C.F.R. 122.21(a); OAR 340-045-0015(2) & (5). Additionally, federal and state regulations require dischargers of stormwater associated with industrial activity to apply for an individual permit or seek coverage under a promulgated stormwater general permit before commencing a discharge. 40 C.F.R. 122.26(c) & (e)(1)(i); OAR 340-045-0015(2) & (5). Swanson Group Incorporated has violated these requirements by failing to apply for NPDES permits, and by failing to do so by required deadlines, for each and every location where Swanson Group Incorporated discharges stormwater associated with industrial activity and/or pollutants from point sources along logging roads to navigable waters of the United States, including discharges from point sources along the Sam Downs Road.

III. NEDC'S INTENT TO FILE SUIT.

The above-described violations reflect only what information currently available to NEDC indicates. All of the violations described in this notice of intent to sue are ongoing. NEDC intends to sue for all violations, including those yet to be discovered or identified and those committed subsequent to the date of this notice of intent to sue.

Under Section 309(d) of the Clean Water Act, 33 U.S.C. §1319(d), each of the above-described violations subjects the violator to a penalty of up to $27,500 or $32,500 per day. In addition to civil penalties, under Sections 505(a) and (d) of the CWA, 33 U.S.C. §§1365(a) and (d), NEDC will seek injunctive relief to prevent further violations and such other relief as is permitted by law. Under Section 505(d) of the CWA, 33 U.S.C. §1365(d), NEDC will also seek recovery of the costs of litigation, including attorneys' and expert witness fees.

NEDC believes that this notice of intent to sue sufficiently states grounds for filing suit. We intend, at the close of the 60-day notice period or shortly thereafter, to file a citizen suit

against Swanson Group Incorporated under Section 505(a) of the Clean Water Act for these and any and all similar violations.

During the 60-day notice period, NEDC would be willing to discuss settlement terms and effective remedies for the violations in this letter. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within 10 days of receiving this notice so that a meeting can be arranged and negotiations completed before the end of the 60-day notice period. NEDC does not intend to delay the filing of a complaint if discussions are continuing when the notice period ends.

Very truly yours,

Washington Forest Law Center

By: _____
Paul A. Kampmeier

Cascade Resources Advocacy Group

By: _____
Chris Winter

cc: Stephen L. Johnson, Administrator, U.S. EPA
Ron Kreizenbeck, Action Regional Administrator, U.S. EPA Region 10
Stephanie Hallock, Director, Oregon Department of Environmental Quality
Jas Adams, Oregon Department of Justice
Lou Ferreira and Greg Corbin, Stoel Rives

United States
Environmental Protection
Agency

Office Of Water
(4203)

EPA 833-K-94-002
March 1995

EPA

Storm Water Discharges Potentially Addressed By Phase II Of The National Pollutant Discharge Elimination System Storm Water Program

Report To Congress

EXHIBIT 1

sources and facilities, classes of facilities with the potential to contribute pollutants to storm water discharges were identified. The analysis of the nature and extent of individual Phase II discharges addresses both pollutant concentrations and the geographic distribution of facilities. The geographical analysis was developed to determine the distribution and location of individual Phase II facilities in relation to Urbanized Areas and the Phase II municipalities identified in the first part of this study. Although there was not enough data available on a national basis to estimate pollutant loadings from individual Phase II sources, the approach taken could later be related to an assessment of water quality conditions at the local, regional, or State level.

2.3.1 Identifying Individual Phase II Storm Water Discharges

The storm water discharge regulations (Phase I) require permit applications from facilities with "storm water discharges associated with industrial activity," as defined in 40 *CFR* 122.26(b)(14) (55 *FR* 47990). This definition describes the 11 specific categories of industrial activities which are regulated. For the categories of industries identified, the term includes storm water discharges from:

> . . . industrial plant yards; immediate access roads and rail lines used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters . . .; sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and finished products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water [40 *CFR* 122.26(b)(14)].

The definitions of the 11 categories include both narrative descriptions of activities and specific designations of industrial operations based on Standard Industrial Classification (SIC) code.[7] For example, category (i) mentions facilities subject to effluent limitations guidelines

[7] The SIC code is the statistical classification standard underlying all Federal economic statistics classified by industry (OMB, 1987).

EXHIBIT 1
Page 2 of 7

developed by EPA, while category (xi) designates many specific SIC codes. Because of the comprehensiveness of the SIC system, even narrative descriptions can be correlated with SIC designations. For example, category (vii) covers steam electric power generating facilities, which are included primarily in SIC 4911, and category (ix) covers domestic treatment works, which are included primarily in SIC 4952. The practical effect of these narrative definitions and specific SIC code designations is that most of the industrial facilities subject to permit application requirements are represented by major SIC groupings 10 through 45.[8]

As a basis for identifying Phase II facilities and obtaining information about their distribution and abundance, this study focused on SIC codes. Major sectors of the economy are defined on the basis of the two-digit SIC code group. The two-digit code is a relatively general categorization of the Nation's economic activity; all industrial, commercial, and retail activities are organized into less than 100 two-digit SIC codes, which are listed in Table 2-5. The more specific four-digit SIC code provides a more detailed breakdown of these enterprises and is much more descriptive of the activities conducted at the establishment. The SIC code identifies facilities based on the "primary activity" in which a facility is engaged. Chapter 4 discusses selected advantages and disadvantages of using the SIC code system for identification of storm water sources. Focusing on SIC codes for the purposes of this study does not imply that EPA must regulate on a SIC code basis. Also, although some potential Phase II categories or concerns may be defined or discussed in terms of narrative descriptions, these can be evaluated in terms of SIC code designations.

Although all unregulated facilities which have point source discharges of storm water are potential Phase II sources, in practical terms, only a subset of four-digit SIC codes have real

[8] The NPDES regulations specifically exempt some categories of activity from the definition of point source, including storm water runoff from agricultural sources and silviculture activities (mostly in SIC codes 01 through 09) (40 *CFR* Part 122.3(e)), irrigation return flows (40 *CFR* Part 122.3(f)), and uncontaminated runoff from mining sites and oil and gas facilities (40 *CFR* 122.26(a)(2)). In addition, construction activities are regulated based on the site where activity is occurring, not based on the SIC code for contractors and builders that may participate in the construction (SIC 15 - 17).

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Table 2-5. List of All Two-Digit SIC Code Groups and Industry Description

SIC CODE	DESCRIPTION	SIC CODE	DESCRIPTION
01	Ag. Product.-Crops	50	Wholesale-Durables
02	Ag. Product.-Livestock	51	Wholesale-Nondurables
07	Ag. Services	52	Bldg. & Gard. Mats.
08	Forestry	53	General Stores
09	Fishing, Hunting	54	Food Stores
10	Metal Mining	55	Auto Dealers & Service
12	Coal & Lignite Mining	56	Apparel Stores
13	Oil & Gas Extraction	57	Furniture Stores
14	Nonmetallic Minerals	58	Eat & Drink Places
15	Building Contractors	59	Misc. Retail
16	Heavy Const. Contractors	60	Banking
17	Spec. Trade Contractors	61	Credit Agencies
20	Man. Food, etc.	62	Security Brokers
21	Man. Tobacco	63	Insurance Carriers
22	Man. Textile	64	Insurance Agents
23	Man. Apparel	65	Real Estate
24	Lumber & Wood	67	Investment Offices
25	Furniture & Fixtures	70	Hotels & Lodging
26	Paper & Allied Prod.	72	Personal Services
27	Printing & Publish.	73	Business Services
28	Chemicals & Allied	75	Auto Repair Services
29	Petroleum & Coal	76	Misc. Repair
30	Rubber & Plastic Products	78	Motion Pictures
31	Leather/Products	79	Amusement Services
32	Stone, Clay & Glass	80	Health Services
33	Primary Metal Ind.	81	Legal Services
34	Fab. Metal Products	82	Educational Services
35	Machinery-electric	83	Social Services
36	Electronic Equip.	84	Museums
37	Transportation Equip.	86	Membership Orgs.
38	Instrument & Related	87	Research & Development
39	Misc. Manufacturing	88	Households w/Employees
40	Railroad Transport	89	Services, NEC
41	Local Pass. Transit	91	Executive, Gen'l Govt.
42	Trucking	92	Justice, Public Order
43	U.S. Postal Service	93	Public Finance, Taxes
44	Water Transport	94	Human Resource Admin
45	Air Transport	95	Env. Qual. & Housing Admin.
46	Pipe Lines-Nat. Gas	96	Economic Program Admin.
47	Transport Services	97	National Security
48	Communication	99	Non-Classifiable
49	Electric, Gas & Sanitation		

EXHIBIT 1
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potential to use, process, or store sources of pollutants, or engage in activities that could lead to contamination of storm water. In addition, there are many general sources of storm water contamination such as parking lots, trash dumpsters, and failing septic systems which could be associated with almost any commercial or residential activity. Some general information on these sources is presented in Chapter 4; however, the focus of this report is in identifying specific classes of facilities with greater than average potential for contribution of pollutants to storm water discharges based on their activities.

EPA identified two major groups of facilities for potential inclusion in Phase II. The first group of potential Phase II facilities identified (Group A) consists of facilities in the same SIC code groups as Phase I facilities (SICs 10-45) that are conducting activities that are essentially the same as Phase I industrial activities but that were not included in Phase I due to the specific language of the statute or EPA's regulatory specificity in defining the universe of Phase I industrial activities. The second major group (Group B) consists of facilities in all other SIC code groups where discharges of pollutants are suspected based on case studies, expert opinions, literature reviews, and other sources of information such as experience with Phase I of the storm water program.[9]

2.3.1.1 Group A Facilities

Group A is comprised of facilities which are generally identical to regulated Phase I industrial activities but that have been excluded from Phase I due to the specific language of the statute or EPA's regulatory specificity. While some of the facilities that make up Group A are obvious, (i.e., those with a specific statutory exemption from Phase I), others are more difficult to identify. Because these facilities may be described by SIC codes identical to Phase I regulated facilities, the FACTS data base was of little use in identifying these

[9] Although some sources similar to Phase I industrial activities were not identified in the 1990 application regulations (55 FR 47990) directly, EPA or an authorized NPDES State has the authority under Section 402(p)(2)(E) to designate individual facilities as needing an NPDES permit. Although some designations of this type have been made, this report bases the distinction of individual Phase I and Phase II facilities based on the regulatory definition and not on any individual designations which may have been made.

EXHIBIT 1
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Sector 1: Timber Products Facilities

The definition of storm water discharges associated with industrial activity includes point source discharges of storm water from eleven major categories of facilities, including: "... category (ii) facilities classified as Standard Industrial Classification (SIC) code 24 (except 2434)." Storm water discharges covered include those from establishments that cut timber and pulpwood, merchant sawmills, lath mills, shingle mills, cooperage stock mills, planing mills, and plywood and veneer mills that produce lumber and wood basic materials; and establishments that manufacture finished articles made entirely of wood or related materials. These facilities use wood as their primary raw material. Industrial activities include the following:

Log Storage and Handling activities include loading and unloading of logs onto trucks or railroad cars for transport to other facilities, log sorting, and storage of logs. In addition, some cutting may be performed, such as chopping off tree branches and sectioning of tree trunks for easier handling during transport. Chipping may be performed at facilities serving pulp industries. Residues generated at these sites may include bark, coarse sawdust, and wood chunks.

Untreated Wood Lumber and Residue Generation Activities occur at the following: saw and planing mills (SIC group 242); millwork, veneer, plywood and structural wood member manufacturing facilities (SIC group 243); wood container manufacturing facilities (SIC group 244); wood building and mobile home manufacturing facilities (SIC group 245); and miscellaneous wood product manufacturers (SIC group 249). These facilities may engage in one or more activities such as log washing, bark removal, milling, sawing, resawing edging, trimming, planing, machining, air drying, and kiln drying. Some facilities generate residue as a product, while other facilities may generate residues as a waste product. A summary of the residues generated include: bark, wood chips, planer shavings, and sawdust.

Wood Surface Protection Activities are accomplished by one of the following three methods: spraying, dipping, and green chain operations. Industrial activities at saw mills with the potential to contaminate storm water include spills from surface protection areas, storage and mixing tank areas, treated wood drippage, transport or storage areas, maintenance and shop areas, and areas used for treatment/disposal of wastes. Fugitive emissions from negative pressure spraying activities and hand spraying surface protection formulations may also result in the contamination of storm water.

Wood Preservation Activities are accomplished by two steps. First, the moisture content of wood is reduced to increase its permeability (this is referred to as conditioning). After conditioning, wood is impregnated with a preservative for fire retardency, insecticidal resistance, and/or fungicidal resistance. Then, the wood stock is often subject to cleaning in order to remove excess preservative prior to stacking treated lumber products outside.

Wood Assembly/Fabrication Activities such as the fabrication of fiberboard, insulation board, and hardboard may involve the use of wax emulsions, paraffin, aluminum sulfate,

melamine formaldehyde, and miscellaneous thermosetting resins. These chemicals may be introduced as part of the board formation process or as a coating to maintain the board's integrity. In the formation of fiberboard/insulation board/hardboards, the digestion of pulp and fiber by mechanical, thermal, and sometimes chemical means takes place. Another operation which involves resinous agents is the formation of veneer. In this process, veneer is placed in hot ponds or vats to soften the wood. Veneer strips are removed and often bound by glue or a resinous agent. Glues are also used in the assembly of wood components. Other types of activities include the finishing of wood products. Stains, paints, lacquers, varnish, water repellents and sealants, etc. may be applied to some of the wood products.

Significant materials at timber products facilities which can contribute pollutants to storm water include: uncut logs, wood bark, wood chips wood shavings, sawdust, green lumber, rough and finished lumber, other waste wood material, non-hazardous wood ash, above and below ground fuel storage tanks, finishing chemicals, solvents and cleaners, petroleum, herbicides, pesticides, fertilizers, sawmill equipment, material handling equipment, boiler water treatment chemicals, scrap metals, scrap equipment and plastics, boiler blowdown water, and leachate from decaying organic matter.

Pollutants from timber products facilities generally include biological oxygen demand (BOD^5), total suspended solids (TSS), chemical oxygen demand (COD), leachate, wood wastes, chemicals, heavy metals, and pH.

Table E-1
Summary Statistics From (Part 2) Sampling Results by Industrial Sector
Industrial Sector I

	Grab Samples (mg/l)				Composite Samples (mg/l)				NURP Results (mg/l)		
Pollutant	No.	Mean	Median	95%	No.	Mean	Median	95%	Mean	Median	90%
BOD5	198	39.63	13.00	193.00	200	45.37	17.00	135.50	12.00	9.00	15.00
COD	19	297.64	131.00	1500.00	198	242.50	122.50	1080.00	82.00	65.00	140.00
Copper	32	0.05	0.03	0.16	29	0.04	0.03	0.12	0.04	0.04	0.09
Lead									0.18	0.14	0.35
NO_3+NO_3-N	189	0.95	0.32	2.20	188	0.75	0.34	1.79	0.86	0.68	1.75
Oil & Grease	107	15.21	2.20	55.00					NR	NR	NR
P, Total	198	23.91	0.29	2.66	199	6.29	0.30	1.72	0.42	0.33	0.70
pH	211	7.17	7.30	8.56					NR	NR	NR
TKN	188	2.57	1.62	9.26	188	2.32	1.50	7.50	1.90	1.50	3.30
TSS	198	1108.42	242.00	4800.00	198	575.27	230.00	2288.00	180.00	100.00	300.00
Zinc	16	0.47	0.37	1.70	15	0.36	0.30	1.20	0.20	0.16	0.50

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

STANDARD INDUSTRIAL CLASSIFICATION MANUAL

1987

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Introduction

The Standard Industrial Classification of Establishments

Purpose and Scope of the Classification

The Standard Industrial Classification (SIC) was developed for use in the classification of establishments by type of activity in which they are engaged; for purposes of facilitating the collection, tabulation, presentation, and analysis of data relating to establishments; and for promoting uniformity and comparability in the presentation of statistical data collected by various agencies of the United States Government, State agencies, trade associations, and private research organizations. The Standard Industrial Classification for *establishments* differs from a classification for *enterprises* (companies) or products. An enterprise consists of all establishments having more than 50 percent common direct or indirect ownership. Other classifications have been developed for use in the classification of commodities or products and also for occupations.

The Standard Industrial Classification is intended to cover the entire field of economic activities: agriculture, forestry, fishing, hunting, and trapping; mining; construction; manufacturing; transportation, communications, electric, gas, and sanitary services; wholesale trade; retail trade; finance, insurance, and real estate; personal, business, professional, repair, recreation, and other services; and public administration.

This edition of the Manual supersedes the 1972/77 edition. Appendix A presents conversion tables between the 1972/77 edition and the 1987 edition.

Principles of the Classification

In reviewing the Classification, the Technical Committee on Industrial Classification was guided by the following general principles:

(1) The Classification should conform to the existing structure of American industry.

(2) Each establishment is to be classified according to its primary activity.

(3) To be recognized as an industry, the group of establishments constituting the proposed classification must be statistically significant in the number of persons employed, the volume of business conducted, and other measures of economic activity.

Appendix B describes in more detail the principles and procedures used for this revision.

Structure of the Classification

The structure of the classification makes it possible to tabulate, analyze, and publish establishment data on a division, a two-digit major group, a three-digit industry group, or a four-digit industry code basis, according to the level of industrial detail considered most appropriate. An agency may use additional subdivisions within specific four-digit industries in adopting this classification for its own use, while still retaining comparability with the classifications used by other agencies.

It should be noted that the digit "9" appearing in the third- or fourth-digit position of the classification code usually designates miscellaneous three-digit industry groups or four-digit industries covering establishments not elsewhere classified. These residual classifications do not usually constitute homogeneous primary activity groups; for purposes of this classification system they are grouped together and treated as a separate industry to retain the homogeneity of the other industries in the group.

Definition of an Establishment

For purposes of this classification, an establishment is an economic unit, generally at a single physical location, where business is conducted or where services or industrial operations are performed. (For example: a factory, mill, store, hotel, movie theater, mine, farm, ranch, bank, railroad depot, airline terminal, sales office, warehouse, or central administrative office.)

Where distinct and separate economic activities are performed at a single physical location (such as construction activities operated out of the same physical location as a lumber yard), each activity should be treated as a separate establishment where: (1) no one industry description in the classification includes such combined activities; (2) the employment in each such economic activity is significant; and (3) separate reports can be prepared on the number of employees, their wages and salaries, sales or receipts, and other types of establishment data.

For activities such as construction, transportation, communications, electric, gas, and sanitary services, and similar physically dispersed operations, establishments are represented by those relatively permanent main or branch offices, terminals, stations, etc., that are either (1) directly responsible for supervising such activities, or (2) the base from which personnel operate to carry out these activities. Hence, the individual sites, projects, fields, networks, lines, or systems of such dispersed activities are not ordinarily considered to be establishments.

An establishment is not necessarily identical with the enterprise (company) which may consist of one or more establishments. Also, it is to be distinguished from subunits of the establishment such as departments. Supplemental interpretations of the definition of an establishment are included in the division, major group, industry group, and industry descriptions of the Standard Industrial Classification

where appropriate. Auxiliary units, as described below, are recognized as special types of establishments.

Auxiliary Establishments

Activities

Auxiliaries are establishments primarily engaged in performing management or support services for other establishments of the same enterprise. An enterprise consists of all establishments having more than 50 percent common direct or indirect ownership. Auxiliary establishments are distinguished from operating establishments that primarily produce goods and from those that primarily provide services for personal or household use or for other enterprises. Some examples of activities commonly performed by auxiliaries are management and other general administrative functions, such as accounting, data processing, and legal services; research, development, and testing; and warehousing.

Establishment Unit

A unit that performs auxiliary functions and is located physically separate from the establishment or establishments served is treated as a separate establishment. A unit that performs auxiliary activities at the same physical location as an establishment that performs operating activities is considered a separate establishment if all of the following conditions are met:

(1) Separate reports can be prepared on the number of employees, their wages and salaries, sales or receipts, and other types of establishment data; and

(2) the unit serves other establishments of the same enterprise; and

(3) employment is significant for both the auxiliary and operating activities.

Exceptions and Borderlines

Some establishments that meet the general definition of auxiliaries are nevertheless treated as operating establishments. They are listed below:

(1) Establishments primarily engaged in producing goods or providing services for other establishments of the same enterprise when such goods or services are covered by industries in Agriculture (Major Groups 01-07 of Division A); Mining (Division B); Construction (Division C); and Manufacturing (Division D) are classified as operating establishments in such Divisions on the basis of their primary activity.

(2) Establishments, including sales branches, sales offices, and sales representatives, primarily engaged in selling tangible products for other than personal or household consumption are classified as operating establishments in Wholesale Trade, with the exception of motion pictures and prerecorded video tapes and disks of the type produced by establishments covered in Major Group 78. Establishments primarily engaged in the wholesale distribution of motion pictures and prerecorded video tapes and disks of the type produced by establishments covered in

Major Group 08. —FORESTRY

The Major Group as a Whole

This major group includes establishments primarily engaged in the operation of timber tracts, tree farms, forest nurseries, and related activities such as reforestation services and the gathering of gums, barks, balsam needles, maple sap, Spanish moss, and other forest products.

Industry Group No. | Industry No.

081 TIMBER TRACTS

0811 Timber Tracts

Establishments primarily engaged in the operation of timber tracts or tree farms for the purpose of selling standing timber. Establishments holding timber tracts as real property (not for sale of timber) are classified in Real Estate, Industry 6519; and logging establishments are classified in Manufacturing, Industry 2411.

Christmas tree growing
Timber tracts
Tree farms

083 FOREST NURSERIES AND GATHERING OF FOREST PRODUCTS

0831 Forest Nurseries and Gathering of Forest Products

Establishments primarily engaged in growing trees for purposes of reforestation or in gathering forest products. The concentration or distillation of these products, when carried on in the forest, is included in this industry.

Balsam needles, gathering of
Distillation of gums if carried on at the gum farm
Distillation of turpentine and resin if carried on at the gum farm
Forest nurseries
Gathering of forest products (e.g., gums, barks, seeds)
Ginseng, gathering of
Huckleberry greens, gathering of
Lac production
Maple sap, gathering of
Moss, gathering of
Pine gum, extraction of
Rubber plantations
Spanish moss, gathering of
Sphagnum moss, gathering of
Teaberries, gathering of
Tree seed gathering, extracting, and selling

085 FORESTRY SERVICES

0851 Forestry Services

Establishments primarily engaged in performing, on a contract or fee basis, services related to timber production, wood technology, forestry economics and marketing, and other forestry services, not elsewhere classified, such as cruising timber, firefighting, and reforestation.

Cruising timber
Estimating timber
Fire prevention, forest
Firefighting, forest
Forest management plans, preparation of
Forestry services
Pest control, forest
Reforestation
Timber valuation

Major Group 09.—FISHING, HUNTING, AND TRAPPING

The Major Group as a Whole

This major group includes establishments primarily engaged in commercial fishing (including crabbing, lobstering, clamming, oystering, and the gathering of sponges and seaweed), and the operation of fish hatcheries and fish and game preserves, in commercial hunting and trapping, and in game propagation.

Industry Group No. | Industry No.

091 **COMMERCIAL FISHING**

0912 Finfish

Establishments primarily engaged in the catching or taking of finfish.

Bluefish, catching of
Cod, catching of
Eels, catching of
Finfish, catching of
Fisheries, finfish
Haddock, catching of
Mackerel, catching of
Menhaden, catching of
Pilchard, catching of
Pollack, catching of
Rays, catching of
Salmon, catching of
Sea herring, catching of
Sharks, catching of
Tuna, catching of
Whiting, catching of

0913 Shellfish

Establishments primarily engaged in the catching or taking of shellfish.

Clams, digging of
Crabs, catching of
Crayfish, catching of
Fisheries, shellfish
Lobsters, catching of
Mussels, taking of
Oyster beds
Oysters, dredging or tonging of
Shellfish, catching of
Shrimp, catching of
Squid, catching of

0919 Miscellaneous Marine Products

Establishments primarily engaged in miscellaneous fishing activities, such as catching or taking of sea urchins, terrapins, turtles, and frogs. The gathering of seaweed and sponges is also included in this industry.

Cultured pearl production
Frogs, catching of
Sea urchins, catching of
Seaweed, gathering of
Sponges, gathering of
Terrapins, catching of
Turtles, catching of

092 **FISH HATCHERIES AND PRESERVES**

0921 Fish Hatcheries and Preserves

Establishments primarily engaged in operating fish hatcheries or preserves. Establishments primarily engaged in the production of fish or frogs under controlled feeding, sanitation, and harvesting procedures are classified in Industry Group 027.

Fish hatcheries
Fishing preserves

097 **HUNTING AND TRAPPING, AND GAME PROPAGATION**

0971 Hunting and Trapping, and Game Propagation

Establishments primarily engaged in commercial hunting and trapping, or in the operation of game preserves.

Industry Group No.	Industry No.	
097		**HUNTING AND TRAPPING, AND GAME PROPAGATION—Con.**
	0971	**Hunting and Trapping, and Game Propagation—Con.**

Animal trapping, commercial
Game management
Game preserves
Game propagation
Game retreats, operation of
Hunting carried on as a business enterprise
Hunting preserves, operation of
Trapping carried on as a business enterprise
Wildlife management

DIVISION D

Manufacturing

The Division as a Whole

The manufacturing division includes establishments engaged in the mechanical or chemical transformation of materials or substances into new products. These establishments are usually described as plants, factories, or mills and characteristically use power driven machines and materials handling equipment. Establishments engaged in assembling component parts of manufactured products are also considered manufacturing if the new product is neither a structure nor other fixed improvement. Also included is the blending of materials, such as lubricating oils, plastics resins, or liquors.

The materials processed by manufacturing establishments include products of agriculture, forestry, fishing, mining, and quarrying as well as products of other manufacturing establishments. The new product of a manufacturing establishment may be finished in the sense that it is ready for utilization or consumption, or it may be semifinished to become a raw material for an establishment engaged in further manufacturing. For example, the product of the copper smelter is the raw material used in electrolytic refineries; refined copper is the raw material used by copper wire mills; and copper wire is the raw material used by certain electrical equipment manufacturers.

The materials used by manufacturing establishments may be purchased directly from producers, obtained through customary trade channels, or secured without recourse to the market by transferring the product from one establishment to another which is under the same ownership. Manufacturing production is usually carried on for the wholesale market, for interplant transfer, or to order for industrial users, rather than for direct sale to the domestic consumer.

There are numerous borderline cases between manufacturing and other divisions of the classification system. Specific instances will be found in the descriptions of the individual industries. The following activities, although not always considered as manufacturing, are so classified:

Milk bottling and pasteurizing;

Fresh fish packaging (oyster shucking, fish filleting);

Apparel jobbing (assigning of materials to contract factories or shops for fabrication or other contract operations) as well as contracting on materials owned by others;

Publishing;

Ready-mixed concrete production;

Leather converting;

Logging;

Wood preserving;

Various service industries to the manufacturing trade, such as typesetting, engraving, plate printing,

and preparing electrotyping and stereotype plates, but not blueprinting or photocopying services;
Electroplating, plating, metal heat treating, and polishing for the trade;
Lapidary work for the trade;
Fabricating of signs and advertising displays.

There are also some manufacturing-type activities performed by establishments which are primarily engaged in activities covered by other divisions, and are, thus, not classified as manufacturing. A few of the more important examples are:

Agriculture, Forestry, and Fishing

Processing on farms is not considered manufacturing if the raw materials are grown on the farm and if the manufacturing activities are on a small scale without the extensive use of paid labor. Other exclusions are threshing and cotton ginning.

Mining

The dressing and beneficiating of ores; the breaking, washing, and grading of coal; the crushing and breaking of stone; and the crushing, grinding, or otherwise preparing of sand, gravel, and nonmetallic chemical and fertilizer minerals other than barite are classified in Mining.

Construction

Fabricating operations performed at the site of construction by contractors are not considered manufacturing, but the prefabrication of sheet metal, concrete, and terrazzo products and similar construction materials is included in the Manufacturing Division.

Wholesale and Retail Trade

Establishments engaged in the following types of operations are included in Wholesale or Retail Trade: cutting and selling purchased carcasses; preparing feed at grain elevators and farm supply stores; stemming leaf tobacco at wholesale establishments; and production of wiping rags. The breaking of bulk and redistribution in smaller lots, including packaging, repackaging, or bottling products, such as liquors or chemicals, is also classified as Wholesale or Retail Trade. Also included in Retail Trade are establishments primarily engaged in selling, to the general public, products produced on the same premises from which they are sold, such as bakeries, candy stores, ice cream parlors, and custom tailors.

Services

Tire retreading and rebuilding, sign painting and lettering shops, computer software production, and the production of motion picture films (including video tapes) are classified in Services. Most repair activities are classified as Services. However, some repair activity such as shipbuilding and boatbuilding and repair, the rebuilding of machinery and equipment on a factory basis, and machine shop repair are classified as manufacturing.

ABBREVIATIONS USED FOR INDEX ITEMS

mach.—machinery
mfpm—made from purchased materials or materials transferred from another establishment.
mitse—made in the same establishment as the basic materials.

Major Group 24.—LUMBER AND WOOD PRODUCTS, EXCEPT FURNITURE

The Major Group as a Whole

This major group includes establishments engaged in cutting timber and pulpwood; merchant sawmills, lath mills, shingle mills, cooperage stock mills, planing mills, and plywood mills and veneer mills engaged in producing lumber and wood basic materials; and establishments engaged in manufacturing finished articles made entirely or mainly of wood or related materials. Certain types of establishments producing wood products are classified elsewhere. For example, furniture and office and store fixtures are classified in Major Group 25; musical instruments, toys and playground equipment, and caskets are classified in Major Group 39. Woodworking in connection with construction, in the nature of reconditioning and repair, or performed to individual order, is classified in nonmanufacturing industries. Establishments engaged in integrated operations of logging combined with sawmills, pulp mills, or other converting activity, with the logging not separately reported, are classified according to the primary product shipped.

Industry Group No | Industry No.

241 LOGGING

2411 Logging

Establishments primarily engaged in cutting timber and in producing rough, round, hewn, or riven primary forest or wood raw materials, or in producing wood chips in the field. Independent contractors engaged in estimating or trucking timber, but who perform no cutting operations, are classified in nonmanufacturing industries. Establishments primarily engaged in the collection of bark, sap, gum, and other forest products are classified in Forestry, Major Group 08.

Bolts, wood: e.g., handle, heading, shingle, stave
Burls, wood
Driving timber
Fuel wood harvesting
Last blocks, wood: hewn or riven
Logging contractors
Logs
Mine timbers, hewn
Peeler logs
Pickets and palling: round or split
Piling, wood: untreated
Pole cutting contractors
Poles, wood: untreated
Posts, wood: hewn, round, or split
Pulpwood camps
Pulpwood contractors engaged in cutting
Rails, fence: round or split
Saw logs
Skidding logs
Stumping for turpentine or powder manufacturing
Stumps
Timber (product of logging camps)
Veneer logs
Wood chips, produced in the field

242 SAWMILLS AND PLANING MILLS

2421 Sawmills and Planing Mills, General

Establishments primarily engaged in sawing rough lumber and timber from logs and bolts, or resawing cants and flitches into lumber, including box lumber and softwood cut stock; planing mills combined with sawmills; and separately operated planing mills which are engaged primarily in producing surfaced lumber and standard workings or patterns of lumber. This industry includes establishments primarily engaged in sawing lath and railroad ties

Industry Group No. | Industry No.

242 SAWMILLS AND PLANING MILLS—Con.

2421 Sawmills and Planing Mills, General—Con.

and in producing tobacco hogshead stock, wood chips, and snow fence lath. Establishments primarily engaged in manufacturing box shook or boxes are classified in Industry Group 244; those manufacturing sash, doors, wood molding, window and door frames, and other fabricated millwork are classified in Industry Group 243; and those manufacturing hardwood dimension and flooring are classified in Industry 2426.

Cants, resawed (lumber)
Ceiling lumber, dressed
Chipper mills
Custom sawmills
Cut stock, softwood
Flitches (veneer stock), made in sawmills
Flooring (dressed lumber), softwood
Fuelwood, from mill waste
Furniture dimension stock, softwood
Kiln drying of lumber
Lath, made in sawmills and lathmills
Lumber stacking or sticking
Lumber: rough, sawed, or planed
Planing mills, independent: except millwork
Resawing lumber into smaller dimensions
Sawdust and shavings
Sawmills, except special product mills
Siding, dressed lumber
Silo stock, wood: sawed
Snow fence lath
Stud mills
Ties, railroad: sawed
Tobacco hogshead stock
Wood chips produced at mill

2426 Hardwood Dimension and Flooring Mills

Establishments primarily engaged in manufacturing hardwood dimension lumber and workings therefrom; and other hardwood dimension, semifabricated or ready for assembly; hardwood flooring; and wood frames for household furniture. Establishments primarily engaged in manufacturing stairwork, molding, and trim are classified in Industry 2431; and those manufacturing textile machinery bobbins, picker sticks, and shuttles are classified in Industry 3552.

Blanks, wood: for bowling pins, handles, and textile machinery accessories
Blocks, wood: for bowling pins, handles, and textile machinery accessories
Bobbin blocks and blanks, wood
Brush blocks, wood: turned and shaped
Carvings, furniture: wood
Chair frames for upholstered furniture, wood
Chair seats, hardwood
Dimension, hardwood
Flooring, hardwood
Frames for upholstered furniture, wood
Furniture dimension stock, hardwood
Furniture squares, hardwood
Furniture turnings and carvings, wood
Gun stocks, wood
Handle blanks, wood
Handle stock, sawed or planed
Lumber, hardwood dimension
Parquet flooring, hardwood
Picker stick blanks
Rounds or rungs, ladder and furniture: hardwood
Shuttle blocks: hardwood
Spool blocks and blanks, wood
Stock, chair: hardwood—turned, shaped, or carved
Table slides, for extension tables: wood
Turnings, furniture: wood
Vehicle stock, hardwood

2429 Special Product Sawmills, Not Elsewhere Classified

Mills primarily engaged in manufacturing excelsior, wood shingles, and cooperage stock; and in sawing special products, not elsewhere classified.

Barrel heading and staves, sawed or split
Cooperage stock mills
Cooperage stock: staves, heading, and hoops—sawed or split
Excelsior, including pads and wrappers: wood
Hoops, wood: for tight or slack cooperage—sawed or split
Sawmills, special product: except lumber and veneer mills
Shakes (hand split shingles)
Shingle mills, wood
Shingles, wood: sawed or hand split
Wood wool (excelsior)
Wrappers, excelsior

Industry Group No. 243

MILLWORK, VENEER, PLYWOOD, AND STRUCTURAL WOOD MEMBERS

2431 Millwork

Establishments primarily engaged in manufacturing fabricated wood millwork, including wood millwork covered with materials such as metal and plastics. Planing mills primarily engaged in producing millwork are included in this industry, but planing mills primarily producing standard workings or patterns of lumber are classified in Industry 2421. Establishments primarily manufacturing wood kitchen cabinets and bathroom vanities for permanent installation are classified in Industry 2434.

Awnings, wood
Blinds (shutters), wood
Brackets, wood
Door jambs, wood
Door trim, wood
Door units, prehung: wood and covered wood
Doors, combination screen-storm: wood
Doors, wood and covered wood
Floor baseboards, wood
Garage doors, overhead: wood
Jalousies, glass: wood frame
Louver windows and doors, glass with wood frame
Millwork products
Moldings, wood and covered wood: unfinished and prefinished
Newel posts, wood
Ornamental woodwork: e.g., cornices and mantels
Panel work, wood
Planing mills, millwork
Porch work, wood
Railings, stair: wood
Sash, door and window: wood and covered wood
Screens, door and window: wood
Shutters, door and window: wood and covered wood
Silo staves, wood
Stairways and stairs, wood
Trellises, wood
Trim, wood and covered wood
Venetian blind slats, wood
Wainscots, wood
Weather strip, wood
Window frames and sash, wood and covered wood
Window screens, wood
Window trim, wood and covered wood
Window units, wood and covered wood
Woodwork, interior and ornamental: e.g., windows, doors, sash, and mantels

2434 Wood Kitchen Cabinets

Establishments primarily engaged in manufacturing wood kitchen cabinets and wood bathroom vanities, generally for permanent installation. Establishments primarily engaged in manufacturing free-standing cabinets and vanities are classified in Major Group 25. Establishments primarily engaged in building custom cabinets for individuals are classified in Retail Trade, Industry 5712.

Cabinets, wood: to be installed
Kitchen cabinets, wood: to be installed
Vanities, bathroom, wood: to be installed

2435 Hardwood Veneer and Plywood

Establishments primarily engaged in producing commercial hardwood veneer and those primarily engaged in manufacturing commercial plywood or prefinished hardwood plywood. This includes nonwood backed or faced veneer and nonwood faced plywood, from veneer produced in the same establishment or from purchased veneer. Establishments primarily engaged in the production of veneer which is used in the same establishment for the manufacture of wood containers, such as fruit and vegetable baskets and wood boxes are classified in Industry Group 244.

Hardwood plywood composite
Hardwood veneer or plywood
Panels, hardwood plywood
Plywood, hardwood or hardwood faced
Prefinished hardwood plywood
Veneer mills, hardwood

Industry Group No. | Industry No

243 MILLWORK, VENEER, PLYWOOD, AND STRUCTURAL WOOD MEMBERS—Con.

2436 Softwood Veneer and Plywood

Establishments primarily engaged in producing commercial softwood veneer and plywood, from veneer produced in the same establishment or from purchased veneer. Establishments primarily engaged in producing commercial hardwood veneer and plywood are classified in Industry 2435. Establishments primarily engaged in the production of veneer which is used in the same establishment for the manufacture of wood containers such as fruit and vegetable baskets and wood boxes are classified in Industry Group 244.

Panels, softwood plywood
Plywood, softwood
Softwood plywood composites
Softwood veneer or plywood
Veneer mills, softwood

2439 Structural Wood Members, Not Elsewhere Classified

Establishments primarily engaged in producing laminated or fabricated trusses, arches, and other structural members of lumber. Establishments primarily engaged in fabrication on the site of construction are classified in Division C, Construction. Establishments primarily engaged in producing prefabricated wood buildings, sections, and panels are classified in Industry 2452.

Structural members, laminated wood: arches, trusses, timbers, and parallel chord ceilings
Trusses, wood

244 WOOD CONTAINERS

2441 Nailed and Lock Corner Wood Boxes and Shook

Establishments primarily engaged in manufacturing nailed and lock corner wood boxes (lumber or plywood), and shook for nailed and lock corner boxes.

Ammunition boxes, wood
Box shooks, wood
Boxes, wood: plain or fabric covered, nailed or lock corner
Carrier trays, wood
Chests for tools, wood
Cigar boxes, wood and part wood
Egg cases, wood
Flats, wood: greenhouse
Packing cases, wood: nailed or lock corner
Shipping cases, wood: nailed or lock corner
Shook, box
Trunk skids, wood

2448 Wood Pallets and Skids

Establishments primarily engaged in manufacturing wood or wood and metal combination pallets and skids.

Pallet containers, wood or wood and metal combination
Pallets, wood or wood and metal combination

2449 Wood Containers, Not Elsewhere Classified

Establishments primarily engaged in manufacturing wood containers, not elsewhere classified, such as cooperage, wirebound boxes and crates, and other veneer and plywood containers. Establishments primarily engaged in manufacturing tobacco hogshead stock are classified in Industry 2421, and those manufacturing cooperage stock are classified in Industry 2429.

Barrels, wood: coopered
Baskets, fruit and vegetable: e.g., till, berry, climax, round stave
Berry cups, veneer and splint
Boxes, wood: wirebound
Buckets, wood: coopered
Casks, wood: coopered
Chicken coops (crates), wood: wirebound for shipping poultry
Climax baskets

Industry Group No. | Industry No

244 WOOD CONTAINERS—Con.

2449 Wood Containers, Not Elsewhere Classified—Con.

Containers made of staves
Containers, veneer and plywood: except nailed and lock corner boxes
Cooperage
Coopered tubs
Crates: berry, butter, fruit, and vegetable—wood, wirebound
Drums, plywood
Drums, shipping: wood—wirebound
Firkins and kits, wood: coopered
Fruit baskets, veneer and splint
Hampers, fruit and vegetable: veneer and splint
Hogsheads, wood: coopered
Hot tubs, coopered
Kegs, wood: coopered
Kits, wood: coopered
Market baskets, fruit and vegetable: veneer and splint
Pails, plywood
Pails, wood: coopered
Splint baskets, for fruits and vegetables
Tanks, wood: coopered
Tierces (cooperage)
Till baskets, veneer and splint
Tobacco hogsheads
Tubs, wood: coopered
Vats, wood: coopered
Vegetable baskets, veneer and splint

245 WOOD BUILDINGS AND MOBILE HOMES

2451 Mobile Homes

Establishments primarily engaged in manufacturing mobile homes and nonresidential mobile buildings. These units are generally more than 35 feet long, at least 8 feet wide, do not have facilities fo storage of water or waste, and are equipped with wheels. Trailers that are generally 35 feet long or less, 8 feet wide or less, and with self-contained facilities are classified in Industry 3792. Portable wood buildings not equipped with wheels are classified in Industry 2452.

Buildings, mobile: commercial use
Mobile buildings for commercial use (e.g., offices, banks)
Mobile classrooms
Mobile dwellings
Mobile homes, except recreational

2452 Prefabricated Wood Buildings and Components

Establishments primarily engaged in manufacturing prefabricated wood buildings, sections, and panels. Establishments primarily engaged in fabricating buildings on the site of construction are classified in Division C, Construction.

Buildings, prefabricated and portable: wood
Chicken coops, prefabricated: wood
Corn cribs, prefabricated: wood
Farm buildings, prefabricated or portable: wood
Floors, prefabricated: wood
Geodesic domes, prefabricated: wood
Houses, portable: prefabricated wood—except mobile homes
Log cabins, prefabricated: wood
Marinas, prefabricated: wood
Panels for prefabricated wood buildings
Sauna rooms, prefabricated: wood
Sections for prefabricated wood buildings

249 MISCELLANEOUS WOOD PRODUCTS

2491 Wood Preserving

Establishments primarily engaged in treating wood, sawed or planed in other establishments, with creosote or other preservatives to prevent decay and to protect against fire and insects. This industry also includes the cutting, treating, and selling of poles, posts, and piling, but establishments primarily engaged in manufacturing other wood products, which they may also treat with preservatives, are not included.

Bridges and trestles, wood: treated
Creosoting of wood
Crossties, treated
Flooring, wood block: treated
Millwork, treated
Mine props, treated
Mine ties, wood: treated
Piles, foundation and marine construc-

Industry Group No. | Industry No.

249 MISCELLANEOUS WOOD PRODUCTS—Con.

2191 Wood Preserving—Con.

tion: treated
Piling, wood: treated
Poles and pole crossarms, treated
Poles, cutting and preserving
Posts, wood: treated
Preserving of wood (creosoting)
Railroad cross bridge and switch ties, treated
Railway crossties, wood: treated
Structural lumber and timber, treated
Vehicle lumber, treated
Wood fence: pickets, poling, rails—treated
Wood products, creosoted

2493 Reconstituted Wood Products

Establishments primarily engaged in manufacturing reconstituted wood products. Important products of this industry are hardboard, particleboard, insulation board, medium density fiberboard, waferboard, and oriented strandboard.

Board, bagasse
Flakeboard
Hardboard
Insulating siding, board—mitac
Insulation board, cellular fiber or hard pressed (without gypsum)—mitac
Lath, fiber
MDF (medium density fiberboard)
Medium density fiberboard (MDF)
Particleboard
Reconstituted wood panels
Strandboard, oriented
Waferboard
Wall tile, fiberboard
Wallboard, wood fiber: cellular fiber or hard pressed—mitac

2499 Wood Products, Not Elsewhere Classified

Establishments primarily engaged in manufacturing miscellaneous wood products, not elsewhere classified, and products from rattan, reed, splint, straw, veneer, veneer strips, wicker, and willow.

Applicators, wood
Bakers' equipment, wood
Baskets, except fruit, vegetable, fish, and belt: (e.g., rattan, reed, straw)
Battery separators, wood
Bearings, wood
Beekeeping supplies, wood
Beerwood (steam bent) products, except furniture
Blocks, tackle: wood
Blocks, tailors' pressing: wood
Boards, bulletin: wood and cork
Boards: chip, ironing, meat and pastry—wood
Boot and shoe lasts, regardless of material
Bowls, wood: turned and shaped
Briquettes, sawdust or bagasse: nonpetroleum binder
Bungs, wood
Buoys, cork
Bushings, wood
Cane, chair: woven of reed or rattan
Carpets, cork
Cloth winding reels, wood
Clothes dryers (clothes horses), wood
Clothes drying frames, wood
Clothespins, wood
Clubs, police: wood
Cooling towers, wood or wood and sheet metal combination
Cork products
Corks, bottle
Covers, bottle and demijohn: willow, rattan, and reed
Curtain stretchers, wood
Dishes, wood
Display forms for boots and shoes, regardless of material
Dowels, wood
Extension planks, wood
Faucets, wood
Follies, wood
Fencing, wood: except rough pickets, poles, and rails
Firewood and fuel wood containing fuel binder
Flour, wood
Frames: medallion, mirror, photograph, and picture—wood or metal
Furniture inlays (veneers)
Garment hangers, wood
Gavels, wood
Grain measures, wood: turned and shaped
Hammers, meat: wood
Hampers, laundry: rattan, reed, splint, veneer, and willow
Handles, wood: turned and shaped
Hubs, wood
Insulating materials, cork
Jacks, ladder: wood
Knobs, wood
Ladders, wood
Last sole patterns, regardless of material
Letters, wood
Life preservers, cork
Mallets, wood
Market baskets, except fruit and vegetable: veneer and splint
Marquetry, wood
Mashers, potato: wood
Masts, wood
Mauls, wood
Moldings, picture frame: finished
Novelties, wood fiber
Oars, wood

Industry Group No. | Industry No.

249 MISCELLANEOUS WOOD PRODUCTS—Con.

2499 Wood Products, Not Elsewhere Classified—Con.

Pads, table: rattan, reed, and willow
Paint sticks, wood
Pencil slats
Plugs, wood
Poles, wood: e.g., clothesline, tent, flag
Pressed logs of sawdust and other wood particles, nonpetroleum binder
Pulleys, wood
Racks, for drying clothes: wood
Rattan ware, except furniture
Reed ware, except furniture
Reels, cloth winding: wood
Reels, for drying clothes: wood
Reels, plywood
Rollers, wood
Rolling pins, wood
Rules and rulers: wood, except slide
Saddle trees, wood
Sawdust, reground
Scaffolds, wood
Scoops, wood
Seat covers, rattan
Seats, toilet: wood
Shoe stretchers, regardless of material
Shoe trees, regardless of material
Signboards, wood
Skewers, wood
Snow fence
Spars, wood
Spigots, wood
Spokes, wood
Spools, except for textile machinery: wood
Stakes, surveyors': wood
Stepladders, wood
Stoppers, cork
Tile, cork
Tool handles, wood: turned and shaped
Toothpicks, wood
Trays: wood, wicker, and bagasse
Trophy bases, wood
Vats, wood: except coopered
Washboards, wood and part wood
Webbing: cane, reed, and rattan
Willow ware, except furniture
Wood, except furniture: turned and carved
Woodenware, kitchen and household
Yardsticks, wood

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, an Oregon non-profit corporation,

Plaintiff,

v.

MARVIN BROWN, *et al.*,

Defendants.

and

OREGON FOREST INDUSTRIES COUNCIL, an Oregon nonprofit corporation; **AMERICAN FOREST AND PAPER ASSOCIATION**, a Delaware nonprofit corporation; and **TILLAMOOK COUNTY**, a political subdivision of the State of Oregon,

Intervenors.

Case No.: 06-1270-KI

PLAINTIFF'S SECOND REQUEST FOR JUDICIAL NOTICE

Plaintiff Northwest Environmental Defense Center ("NEDC") hereby requests that the Court take judicial notice of the following documents pursuant to Federal Rule of Evidence 201:

1. The Oregon Department of Forestry's June 20, 2003, Forest Practices Technical Note Number 8, *Installation and Maintenance of Cross Drainage Systems on Forest Roads* (Exhibit 1).

2. Excerpts from the Oregon Department of Forestry's July 2000 *Forest Roads Manual* (Exhibit 2).

The documents submitted by Plaintiff are properly before the Court on a request for judicial notice. Facts subject to judicial notice may be considered on a motion to dismiss. *Mullis v. United State Bank Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987). All of the documents submitted by NEDC are documents produced by state agencies and are subject to judicial notice pursuant to FRE 201. *PG&E v. Lynch*, 216 F.Supp.2d 1016, 1026 (N.D. Cal. 2002) (official public records of the California Public Utilities Commission subject to judicial notice). The contents of these agency documents are "adjudicative facts" that are not subject to reasonable dispute. FRE 201(a)-(b). The accuracy of the documents is also capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned. *Id.*

RESPECTFULLY SUBMITTED this 10th day of January, 2007.

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Installation and Maintenance of Cross Drainage Systems on Forest Roads

Forest Practices Technical Note Number 8
Version 1.0

June 20, 2003

Objective: Technical notes are written to help resource professionals, in this case engineers and foresters responsible for road design or maintenance. This note provides technical guidance on recent road drainage rule revisions. Effective road drainage controls runoff waters and directs these waters to locations where they have little or no effect on water quality. This note does not provide information on stream crossing structures. Forest Practices Technical Notes 4 and 5 provide guidance on stream crossing structures.

Resource Issues: A Forest Practices Advisory Committee (FPAC) was assembled in 1999 to review existing forest practices and make recommendations to effectively protect salmon habitat and water quality. After review of the scientific and monitoring data, the FPAC made the following recommendations to improve drainage of forest roads:
1) better clarify the objectives of the road drainage rules so that the risk of sediment delivery to waters of the state from new roads is minimized, and
2) require additional cross drainage installation as a maintenance requirement prior to an operation when current road condition and a proposed use will impair water quality.

Effective road drainage is necessary to protect the road prism from damage, to keep the road surface stable, and to allow efficient forest management. Good drainage for

resource protection also helps ensure a stable, effective forest road. Proper drainage allows full use of forest roads and reduces maintenance and repair costs. Based on the results of recent Rule Compliance; Wet Season Road Use; Storm Impacts and Landslides of 1996; and Road Sediment monitoring projects, it is important to pay special attention to drainage if the following situations are encountered:

- Near stream crossings and in wetlands;
- On roads that are parallel to and very close to streams;
- On roads where use is changing from inactive to active timber haul;
- When reconstructing old roads, especially sidecast constructed roads on slopes steeper than 60%; and
- On existing roads where gullies have developed in the ditch or at culvert outlets.

Forest Practice Rules: The Board of Forestry adopted revised rules that were effective on January 1, 2003. The rule for road design (for new and reconstructed roads) has been clarified. There is now a clear priority for locating cross-drainage structures. The substance of this rule has not been changed, as shown below. The road maintenance (for older roads) rules have been modified, with a new requirement to install additional drainage where needed to protect water quality (see page 12 of this Note).

OAR 629-625-0330
Drainage

(1) The purpose of this rule is to provide a drainage system on new and reconstructed roads that minimizes alteration of stream channels and the risk of sediment delivery to waters of the state. Drainage structures should be located based on the priority listed below. When there is a conflict between the requirements of sections (2) through (6) of this rule, the lowest numbered section takes precedence, and the later-numbered and conflicting section shall not be implemented.

(2) Operators shall not concentrate road drainage water into headwalls, slide areas, high landslide hazard locations, or steep erodible fillslopes.

(3) Operators shall not divert water from stream channels into roadside ditches.

(4) Operators shall install dips, water bars, or cross drainage culverts above and away from stream crossings so that road drainage water may be filtered before entering waters of the state.

(5) Operators shall provide drainage when roads cross or expose springs, seeps, or wet areas.

(6) Operators shall provide a drainage system using grade reversals, surface sloping, ditches, culverts and/or waterbars as necessary to minimize development of gully erosion of the road prism or slopes below the road.

DRAINAGE SYSTEM FOR NEW AND RECONSTRUCTED ROADS

The road drainage rule now provides a specific order for locating road drainage structures. Where there are conflicts, use the following priority order for placing drainage structures.

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A) Do not collect drainage and discharge it on steep slopes, headwalls, and active and recently active landslide areas, since additional water can trigger landslide movement. **This may require routing drainage to stream channels.**
B) Place stream crossing structures at all stream channels, so streams are never running in a ditch.
C) Provide a cross drainage structure for filtering immediately upstream from stream crossings to allow muddy runoff to seep into the forest floor.
D) When wet areas are crossed, provide drainage to keep water from affecting the road surface.
E) The **last** item is to slope the road so that the need for cross drains is reduced and to place essential cross drains on the rest of the road at a spacing that will prevent gully formation (either in the ditch, or below the cross-drain).

Road reconstruction includes any road re-location, widening, or replacement of stream crossing structures. It does not include removal of brush, bank slough, or the addition of or replacement of cross drainage structures alone. The road design rules, including 629-625-330, apply directly only to the road segments under reconstruction and to new construction. However, if existing road drainage is inadequate, the department may direct drainage repairs on all portions of the road under OAR 629-625-600 (9), as described later in this Technical Note.

A. Road drainage and landslides

Science and monitoring

Robison and others (1999) and other studies have found that road drainage waters directed onto landslide prone locations increases the risk of landslides. Since landslides can cause very large inputs of sediment, it is a priority to reduce landslide occurrence. Locations where added water is most likely to increase landslide occurrence include high landslide hazard locations, especially headwalls; existing landslide deposits; and steep fillslopes. Each of these terms is defined below.

Terminology

Headwalls are steep, concave slopes that do not contain stream channels. The headwalls of greatest concern meet the high landslide hazard slope steepness criteria (see below). However, concentration of drainage to any headwall steeper than around 60 percent can also trigger landslides.

Slide areas include all active and recently active landslide deposits. There are two common slope forms for slide areas: 1) an upper scarp, main body, and toe (Figure 1) or 2) multiple scarps and hummocks (Figure 2). Some slides may pre-date the age of the stand of trees currently on the site. The fact that the trees are straight does not necessarily imply the landslide is inactive.

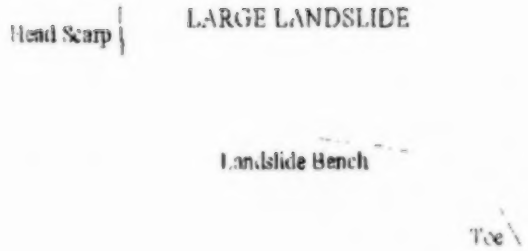

Figure 1. Shape of deep-seated landslide; scale on order of 50 to 1000 feet.

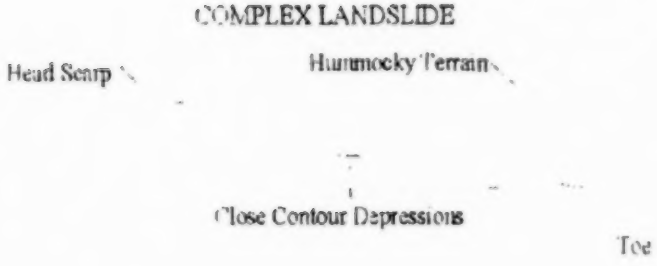

Figure 2. Common ground features of complex landslides; scale on order of thousands of feet.

Steep erodible fillslopes include any fills of mostly soil and over 2 feet thick on slopes over 60 percent, or over 50 percent if soils are wet (springs or seeps during the wet season) or within 100 feet of streams.

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High landslide hazard locations are defined by OAR 629-600-0100 (31) as specific sites that are subject to initiation of a shallow, rapidly moving landslide. The specific criteria for determination of these sites is found in 629-623-0100 (3) as

(a) The presence, as measured on site, of any slope in western Oregon (excluding competent rock outcrops) steeper than 80 percent, except in the Tyee Core Area, where it is any slope steeper than 75 percent; or

(b) The presence, as measured on site, of any headwall or draw in western Oregon steeper than 70 percent, except in the Tyee Core Area, where it is any headwall or draw steeper than 65 percent.

(c) Notwithstanding the slopes specified in (a) or (b) above, field identification of atypical conditions by a geotechnical specialist may be used to develop site specific slope steepness thresholds for any part of the state where the hazard is equivalent to (a) or (b) above. The State Forester shall make the final determination of equivalent hazard. *For more information on high landslide hazard locations, see Forest Practices Technical Note # 2.*

Concentration of road drainage means collecting drainage from one location and directing it to a location where it had not flown to prior to road construction. A serious example of improper drainage concentration is a ditch that carries water from one headwall and discharges water to another headwall. Another example is a ditch that carries water from off of an active or recently active landslide and discharges water onto an active or recently active landslide.

Implementation

Most landslide prone locations can be identified during field reconnaissance during road layout. Use of an accurate clinometer and observation of slope form looking for headwalls (visibly concave steep slopes), scarps (local, very steep slopes) and hummocky (irregular) terrain are the tools needed to identify potentially unstable terrain.

Drainage structures should not be located to discharge onto headwalls, except in cases where drainage water can be directed onto headwalls that have previously failed and are scoured to rock. When roads are constructed across continuous high landslide hazard locations, cross drains should be placed so that drainage flows to convex or uniform slopes near each spur ridge. For existing landslides, cross drainage should be placed just above the location before the road begins to enter the existing landslide area.

B. Avoiding diversion of stream channels

Science and Monitoring

Ditches normally have finer soil material than do stream bed and banks, thus are more easily eroded. When stream flows are diverted onto these more erodible materials, increased erosion is almost certain. In addition, research and monitoring have also shown that sediments are also easily eroded from road surface. ODF monitoring turbidity in streams increased in proportion to the flow observed in ditches. When streams are

diverted into ditches, there is no opportunity to filter sediments to the forest floor (see Section C of this Technical Note).

Terminology

Stream channels have defined bed and banks, meaning that there has been sorting of material by flow. Streambeds contain less fine soil particles than surrounding soils.

A ***gully*** is a trench of at least 6 inches in depth carved into soil, rock or fill by runoff and not located in a channel, in a location where eroded material can be deposited into waters of the state. Gullies are distinguished from stream channels by the lack of sorting of materials. Gullies are formed by infrequent rainfall events or redirection of surface drainage, and disappear over time if drainage is re-directed.

Implementation

This rule is very simple, always place a culvert at stream crossing locations. Never use a roadside ditch to connect two stream channels. Limited excavation further from the road can be acceptable in cases where small streams come together at the crossing.

C. Cross drains for filtering

Science and Monitoring

The forest floor can usually absorb large amounts of water, and can be used to greatly reduce the potential for muddy runoff entering streams. In western Oregon, undisturbed forest soils can often absorb over 10 inches of water per hour. When muddy runoff waters are directed to these soils, water flows into the ground, leaving the road-generated sediment on the forest floor. Research has shown that sediment plumes typically extend from about 5 feet to 130 feet below cross drain culverts (except when gullies form, which often extend to stream channels). The distance muddy runoff water travels increases with road grade and spacing to the next cross drainage structure.

The recently completed wet season road use monitoring study found that, after rainfall, the factor that had the greatest effect on turbidity was the length of road delivering to streams. This appears to have been a more significant factor than surfacing durability.

Implementation

Drainage waters must be directed onto undisturbed soils. Cross drains need to be installed as close to stream crossings as possible and allow between 15 and 200 feet of ground filtering between the outlet of the cross drain and the high water level of the stream, as measured from the stream (Figure 4). The distance depends in part on the slope of the ground below the drain discharge, the road grade and the distance to the next culvert up the road (see Table 1).

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Figure 4. Installation of cross-drains above stream crossings to effectively filter muddy runoff.

Table 1. Suggested distances for filtering

Road grade	Distance to next cross-drain up road		
	under 300 feet	300-600 feet	over 600 feet
0 to 5 %	15 ft	30 ft	50 ft
6 to 12 %	30 ft	60 ft	100 ft
13 to 19 %	50 ft	100 ft	150 ft
over 20 %	60 ft	120 ft	200 ft

Cross drains should be 50 to 200 feet from the stream crossing, as measured along the road (Figure 4). For effective filtering, soils must not have been disturbed by logging

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equipment, should include no fill, and slope steepness should be less than 60 percent, if possible. For continuous high landslide hazard locations, or sections of steep fill too long for half rounds, ditch flow may need to discharge directly into streams. Also, if soils are disturbed, additional filtering distance is required.

D. Drainage of wet areas

Science and Monitoring

Water saturation on the road surface greatly reduces the strength of that surface. This results in erosion of the surface, and also results in a road that may not be driveable. In most cases, there are many solutions for drainage of a wet surface.

Terminology

Springs flow from a single location for all or most of the year, and have a significant flow at some time of the year.

Seeps flow from multiple locations, each seep has little flow volume.

Wet areas are locations where soil is saturated or nearly saturated during periods when the road is used.

Implementation

If flows are high, a culvert should be installed at the location of the spring or seeps, so that the potential for ditch erosion, and movement of surface fines from the road is eliminated. As a rule of thumb, high flow is considered to be that which fills a 5-gallon bucket in a minute.

Soil fill should not be placed directly on wet areas since it will become soft and lead to an unstable surface. For areas with moderately wet soils, a free-draining gravel at the base of the fill can be used in most cases. If the flow is significant or soils are very soft or unstable, a perforated culvert or a French drain (gravel wrapped in geotextile) may also be needed. Geotextiles placed on top of wet areas can effectively separate wet soils from the road surface materials if the geotextiles are not damaged during construction or use.

E. Road drainage system

Science and Monitoring

Monitoring of road drainage systems has found that most landowners in western Oregon use a crowned surface for permanent roads. Most temporary roads have limited surface shaping. Waterbars are generally installed on temporary roads after use. There is little research on the suitability of outsloping for permanent roads. Outsloped roads are not considered suitable for road grades exceeding 8% unless the road is rocked and not used when snow or ice are present.

E (1). Selecting a drainage system

A drainage system includes surface sloping and structures to direct water away from the road prism. There are many drainage system components and options available for almost every road, and any road can and usually should use different drainage systems as conditions change. The choice of appropriate drainage systems depends on whether the road is permanent or temporary, season of use, haul volume, local climate, soil and rock conditions, and landowner needs. The following section discusses advantages and disadvantages of the major drainage systems.

Surface shape: Permanent roads must have one of three shapes: crowned, outsloped or insloped. Use of multiple shapes on the same road is also acceptable. Temporary roads may be constructed with little surface slope as long as cross ditches or other structures are installed prior to periods when rainfall or snowmelt can be expected. Temporary roads must have drainage structures installed at all stream crossings, and also on all road segments over 1000 feet in length that do not have grade reversals.

Terminology

Crowned roads provide the best drainage for roads with high traffic use, or for roads that are used during the wet season.

Insloping of road is usually only appropriate for short stretches where the slope below the road is potentially unstable.

Outsloped roads are best on lower use roads with gradients under 8 percent. They should be augmented with waterbars or other drainage structures if there is potential for any traffic (including unauthorized) or if they are used on pitches steeper than 8 percent. Waterbars should also be installed or reinstalled to filter water next to all stream crossings prior to each wet season.

E (2). Cross-drainage structures

Science and Monitoring

Soil properties and road grade have a major influence on ditch erosion and potential for gullies to develop (Arnold, 1957). ODF monitoring found that culverts comprise about 35 percent of the cross drainage structures use on forest roads in western Oregon. Waterbars and ditch-outs each make up about 15 percent the cross drainage structures used in western Oregon. Many roads also had non-engineered drainage features (water flowing across the road without any structure). ODF monitoring also found that roads with steeper grades (over 9 percent) often had fewer cross drains than less steep roads, with spacing exceeding that recommended to reduce ditch erosion.

Implementation

The location and installation of cross-drainage structures is the final element of drainage, and recognizes there are many ways to drain a road. Local experience is important here. First, look for opportunities that do not require the use of structures across the road. Use of ditch-outs as roads cross ridges is very effective, as are grade reversals. Cross drains must be placed more frequently as road grades get steeper and in more erodible materials, like decomposed granite. The culvert spacing guidelines in Table 2 are based on Arnold (1957) but have been simplified to consider only two soil types, normal and erodible. Most soils are considered normal. Erodible soils include decomposed granitics in southwest Oregon, volcanic ash in eastern Oregon, and any soils with natural gullies or a history of surface erosion problems at that location.

Table 2. Typical minimum culvert spacing for erosion control

	Culverts draining to forest floor	
Road Grade	**Normal Soils**	**Erodible Soils**
0 to 1 % dry season	1500 feet	1000 feet
*0 to 1 % wet season**	*300 feet*	*300 feet*
2 to 5 %	1000 feet	700 feet
6 to 12 %	700 feet	400 feet
13 to 19 %	400 feet	250 feet
over 20 %	250 feet	150 feet

* *water ponds on flat grades so extra drainage is needed for roads used during wet periods*

Table 2 is applicable for effective, well-maintained structures only. If waterbars are used, they should be installed at closer spacing, since waterbars can be easily damaged if filled with sediment by traffic (authorized or unauthorized). Note that the lengths in Table 2 are typical, and should always be adjusted to make sense for local conditions. If another local criteria effectively works to keep sediment out of streams, it should be used instead of the criteria in Table 2.

Standard drainage structures

Culverts are usually metal or plastic, with a standard recommended diameter of 18 inches. Culverts are the drainage structure of choice for high volume roads in western Oregon that are used during the wet season. Culverts are typically galvanized steel or heavy plastic. Plastic relief culverts are easier to install, have a longer life expectancy, and are less likely to be damaged by maintenance activities, but are flammable.

Ditches are inboard trenches large enough to carry the highest expected flow, taking into account likely erosion and growth of vegetation. They carry water between drainage structures on crowned roads and are usually at least 2 feet wide and 1 foot deep.

Waterbars are diagonal berms made by cutting and filling across the road. Waterbars are very effective on roads with low speed and light traffic volume. They are best installed or reinstalled after active timber hauling operations, as they require periodic rebuilding.

Dips are fairly gentle grade reversals of the road surface. The lowest point of the dip must be lower in elevation that rise further down the road. They are generally not useable for wet season use roads (especially for high volume). On gentle road grades rolling dips allow moderate vehicle speeds. For steep grades, dips slow traffic greatly, so not usually chosen for mainlines in steep terrain.

Cross-ditches are appropriate only on roads with no traffic. They must be removed prior to use by traffic. They are very effective at getting water across the road, though are subject to vandalism by persons wishing to have vehicular access. Cross ditches do not normally require maintenance unless they have been vandalized or otherwise removed.

Ditch-outs are short ditches installed at or near ridgelines near where roads cross the ridge. They are very low cost, and should be installed at every ridge crossing if drainage would not naturally flow off the road.

Grade reversals are high points in the road. Design using grade reversals reduces the number of other cross-drains needed.

Alternative drainage structures

Rubber flap water diverters are constructed with "sheets" of heavy flexible rubber or plastic (usually industrial conveyor belting) attached to timbers. The timbers are buried in the road surface, so that the flexible material extends out (about 3 inches) and can deflect water off the road. They are installed at an angle across the road, similar to waterbars. Roads must be outsloped for rubber water diverters to work..

French drains are used to drain wet areas. The are usually made by ditching through the wet area and back filling with clean gravel (usually river rock). Geotextiles are placed in the ditch and wrapped around the rock if soil is fine (mostly silt, clay or muck). If anticipated flows are high, a perforated pipe is also installed in the middle of the drainage

gravel. Design, installation technique and long term maintenance are all very important when considering French drains. Equipment operators can ruin an expensive French drain during routine maintenance if they are not aware where these are located.

Discouraged drainage structures

Open top culverts easily plug, and are difficult or impossible to clean.

Small diameter (under 15 inch) ***culverts*** plug very easily.

ROAD DRAINAGE IMPROVEMENT ON ACTIVE ROADS

Maintenance rule change
OAR 629-625-600(9) Where needed to protect water quality, as directed by the State Forester, operators shall place additional cross drainage structures on existing active roads within their ownership prior to hauling to meet the requirements of OAR 629-625-0330.

Protecting Water Quality

Road drainage must be improved when there is the likelihood of substantial sediment delivery if the drainage system is not upgraded. Inspection of road drainage on inactive roads prior to active road use is essential. Evidence of potential sediment delivery include the following conditions:

Road use changing - likely sediment delivery

- No cross drain structure (for filtering) within 200 feet of a stream crossing
- Streams running in roadside ditches

Road use not changing - likely sediment delivery on any road

- When gullies (over 100 feet in length) exist in a ditch, or below a cross drain
- Surface drainage waters flow into cracks on the outside edge of the road
- When more than 30 percent of the road system draining directly to streams or into gullies (a goal for a superior road is 15 percent)

Repairs for older roads

When repairing older roads, streams running down ditches need to be put back into the original channel. Other common repairs are adding cross drains for filtering above stream crossings, and installing new cross-drains where gullies have formed in the ditch or at culvert outlets. In general, the information on drainage of new roads as described earlier in this Technical Note are also appropriate for maintenance of older roads. Use any technique that efficiently fixes the problem.

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Molalla, 14995 S Hwy 211, 97038	503-829-2216
Santiam, 22965 N Fork Rd SE, Lyons, 97358	503-859-2151
Philomath, 24533 Alsea Hwy, 97370	541-929-3266
Dallas, 825 Oak Villa, 97338	503-623-8146
Toledo, 763 Forestry Rd, 97391	541-336-2273
Roseburg, 1758 NE Airport Rd, 97470-1499	541-440-3412
Coos Bay, 63612 Fifth Rd, 97420	541-267-4136
Gold Beach, 315 Gauntlett Street, PO Box 603, 97444	541-247-6241
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Springfield, 3150 E. Main, 97478	541-726-3588
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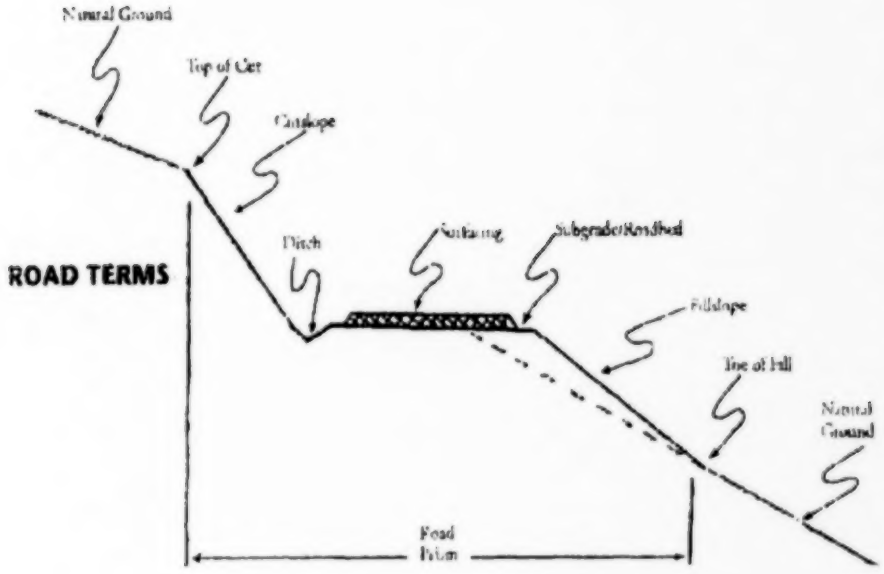

State Forests Program

Forest Roads Manual

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Introduction

A well planned, designed, constructed, and maintained system of forest roads is essential to facilitate forest management and protection of natural resources. Road design is the process of determining the "what, where, when, and how" for a new road construction, road improvement, or extra-ordinary road maintenance project. It begins after careful planning has determined that the project is necessary.

The designer of a project will consider the following factors:

- The purpose and intended use of the project. Included in this factor are length of use (temporary or permanent), amount of use (light, medium, or heavy), time of use (intermittent or continuous), and type of use (commercial, recreational, or administrative).
- The physical conditions affecting the project. Included in this factor are soils, topography, high risk sites, streams, wetlands, bedrock, weather, etc.
- Environmental conditions affecting the project. Included in this factor are fish bearing streams, threatened and endangered species, environmentally sensitive sites, scenic values, recreational use, etc.
- Benefits, costs, and risks associated with the project. Included in this factor is the consideration of alternative designs and locations for the project. The design will strive for maximizing benefits and minimizing costs and risks.

Goals of Road Design

1. Design roads that meet access needs.
2. Design roads to meet or exceed all Forest Practices Act road design rules to minize environmental impacts on natural resources.
3. Design roads that are economical to construct and maintain.

Objectives of Road Design

1. Facilitate building roads in the best locations to meet forest management needs and minimize impacts to natural resources.
2. Ensure that the proper standard of road is constructed to facilitate the projected use without overbuilding or excessive cost.
3. Provide drainage that removes water from the road prism before it can cause problems and that will:
   - Allow the use of roads during the seasons of desired use.
   - Minimize the impact on water quality and aquatic habitat that is caused by roads.
   - Maintain the stability of forest slopes that are impacted by roads.
   - Minimize the disruptions to natural drainage patterns.
   - Reduce the amount and cost of road maintenance.
   - Minimize the impacts if drainage failures occur.

4. Provide project direction that will aid efficient, economical construction of the project.
5. Provide road designs that contain accurate information to facilitate:
   - Clear communication of specifications and expectations for road projects. The written specifications should help project administrators and contractors construct projects as designed.
   - Accurate, fair cost estimates for construction projects, which will support doing the project as planned.

Road Design Strategies

Road design strategies are the specific actions and standards that will lead to achieving the goals and objectives of this section of the manual.

Engineering Procedures

The engineering procedures listed in this section are the minimum standards of engineering design work that will be utilized when designing road projects. The road designer should go beyond the minimum engineering procedures when circumstances dictate.

Generally, the engineering procedures that are utilized are dependent upon two factors. The first is the level of risk to natural resources posed by the road. The higher the chance that serious damage could occur to a natural resource as a result of the road project, the higher the level of engineering procedures that should be used to design the project. The second is the grade and alignment of the road. Steeper grades and more difficult alignments require higher levels of engineering procedures.

The road designer should visualize the desired finished road and determine what engineering procedures are needed to be sure that the project can and will be completed as desired. Unneeded engineering procedures waste time and energy in designing projects and may require wasteful construction practices. Likewise, not using adequate engineering procedures can result in the project not meeting objectives and damaging natural resources.

The road designer must be familiar with and understand the relationship between engineering procedures (this section) and road design standards (the following section). Engineering procedures and road design standards are not interchangeable. For example, to design a low use road may require upper level engineering procedures if a portion of the road crosses a high-risk site.

Base Level Engineering Procedures

Base level engineering procedures are applicable when all of the following criteria are met:

- Spur roads, usually less than ¼ mile in length, often temporary use.
- Gentle road grades that are less than 10%.
- Gentle side slopes of less than 35%, or ridgetop roads.
- High-risk sites or other Natural Resource concerns are not involved.

Base level engineering procedures include:

- Reconnaissance.
- Flag or stake centerline.
- Reference beginning and ending points and other control points as needed.

Mid-Level Engineering Procedures

Mid-level engineering procedures are applicable when one or more the following criteria are met:

- Spur roads longer than ¼ mile, usually permanent.
- A portion of the road has grades that exceed 10% but are less that 17%.
- A portion of the road is located on slopes greater than 35% but less than 60% and high-risk sites are not involved.

Mid-level engineering procedures will be applied to any portion of the road meeting the above criteria. Mid-level engineering procedures include:

- Reconnaissance of P-line(s) and topography.
- Run grade line.
- Field design final centerline location.
- Mark centerline with paint on stumps and hang flagging
- May be slope-staked, but generally reference tags are adequate (see section on "Referencing Centerline")

Upper Level Engineering Procedures

Upper level engineering procedures are used when one or more of the following criteria are met:

- Mainline roads.
- Portions of the road:
  a) Are located on slopes over 60%, or
  b) Cross a high-risk site, or
  c) Cross a sharp "V" draw, or
  d) Cross a sharp ridge and horizontal and/or vertical curves are a concern, or
  e) Have sections of "through cut" or fills where the fill or cut heights exceed 10 feet, or
  f) Cross fish bearing streams, or
  g) Have long stretches of continuous road grades greater than 16%, or
  h) Require end hauling, or
  i) Require critical alignment, or
  j) Cross through or are adjacent to environmentally sensitive sites.

Upper level engineering procedures will be applied to roads or portions of roads meeting the above criteria. Upper level engineering procedures include:

- Reconnaissance.
- P-Line.
- Grade Line.
- Plan.
- Profile.
- Office-locate L-line.
- Cross-section.
- Slope stake or reference L-line. (See section on "Referencing Centerline Location")

Where a planned road has segments that meet the criteria for upper level engineering procedures and the remainder of the road meets the criteria for base or mid level engineering procedures, a combination of procedures may be used. For example, a permanent spur road has moderate grades and is located on moderate slopes. However, it crosses a fish-bearing stream. The stream crossing will be designed using upper level engineering procedures, while the remainder of the road can be designed using mid-level engineering procedures.

Road Design Standards

Roads on state-owned forest land will be designed to meet the planned use of the road. The design will limit the alteration of natural slopes and drainage patterns to that which will safely accommodate the anticipated use of the road, protect water quality and aquatic habitat, and maintain site productivity. The standard of road will be consistent with good safety practices, while keeping construction and maintenance costs to a minimum.

When determining the road design standard, the following factors will be evaluated:

- The volume of traffic that will use the road at any given period of time and that will be expected to use the road over its duration.
- The type of vehicles that will use the road.
- The topography and soils where the road will be located.
- Duration of use (permanent, temporary, seasonal, or year around).
- Public use(s) of the road.
- Sensitive natural resources that may be affected by the road.
- Future road maintenance requirements.

Design Standards for Low Use Roads

Description: These are generally roads that are used for a short term, intermittently and/or have a low traffic volume. Use may be heavy during periods of log hauling but minimal at other times. May be temporary roads that are closed or vacated after use. May be operator-designed or "loggers choice" spur roads that require approval by the Department of Forestry. Oftentimes they are short (less than ¼ mile) spurs that access a single logging unit. May have seasonal restrictions on their use. May be administrative roads that are not used by the public or for commercial uses.

Design standards:

Subgrade	12 to 16 feet wide
Drainage	out-sloped or in-sloped (no ditch), dips, waterbars, temporary stream crossings (removed after road use is completed)
Surfacing	optional (pit or jaw run, if used)
Minimum curve radius	50 feet plus curve widening
*Grade limitations	up to 30%, roads over 20% will be vacated after use

Design Standards for Medium Use Roads

Description: These are generally semi-permanent or permanent usage roads that may access more than one logging unit, receive moderate use by the public during portions of the year, and/or provide important access for administrative purposes. Use may be heavy during periods of log hauling and light to moderate during other times. May need to accommodate heavy equipment and large yarders. May need to accommodate public use during portions of the year. May be closed and put in an inactive status during periods of non-use. Usually primary spur roads that are more than ¼ mile in length.

Design Standards:

Subgrade	14 to 16 feet wide with a 2 to 3 foot ditch
Drainage	insloped or crowned with ditch, relief culverts, and stream crossings.
Surfacing	optional (crushed rock, jaw or pit run if used)
Minimum curve radius	50 feet plus curve widening
*Grade limitations	up to 20%, usually under 18%

Design Standards for High Use Roads

Description: These are generally permanent roads that have high traffic volumes, higher speeds, movement of heavy equipment and/or a high level of public use during portions of the year. They are useable by a lowboy truck, which is a key design vehicle. May have high public and recreational usage during parts of the year. They are usually important roads for administrative purposes. And, they are usually a mainline road that accesses a large geographic area.

Design Standards:

Subgrade	16 to 22 feet wide plus a 3 foot ditch
Drainage	crowned, with ditches, relief culverts, and stream crossings including bridges
Surfacing	pit run, jaw run or crushed rock for base and crushed rock for driving surface
Minimum curve radius	70 feet plus curve widening
*Grade limitations	up to 14%

Grades over 20% require assist vehicles (OAR 437-80-065). Rock surfaced grades over 16% require special surfacing design to alleviate traction problems (consult geotechnical specialist or staff engineer).

Road Design Criteria

A number of criteria must be considered in designing roads. These are discussed in the following paragraphs.

Coordinated Planning and Location of Roads

Forest management operations planning and planning for forest transportation are dependent on each other. These two plans must be coordinated to provide for an efficient and effective overall plan. Professional foresters and forest engineers with knowledge, skills and abilities in the access requirements for forest management operations and the design, construction, and maintenance of forest roads make these important decisions. Management activities will be planned to take advantage of existing road systems when appropriate. Environmental and economical evaluations of both planned management operations and planned road construction/improvement will be performed to achieve the optimum design combination for the two activities. Careful planning and location of roads will ensure that roads are located where potential impacts to natural resources such as water quality and aquatic habitat are minimized. The areas served by each road will be maximized where possible; thus minimizing the amount of road needed to meet management objectives.

Reconnaissance

Reconnaissance involves reviewing the area and then identifying and evaluating the best locations for roads, landings and logging settings. Aerial photos, maps, and local knowledge as well as walking the ground are used to determine the best locations for the road. This is the time to identify potential control points such as landing locations, ridgetops, stream crossings, benches and other locations that may be desirable locations for the road. Location/reconnaissance will include a route assessment of alternatives and ending location(s). Sensitive natural resources on or near these routes will be identified. These include all streams (with special recognition for Type F(ish) and Type D(omestic), wetlands, slopes over 50 percent (especially high-risk sites), and wildlife sites. To avoid these resource areas, the road location will use grade and alignment changes up to the upper limits as defined in the road design standards. Where the sensitive natural resources cannot be avoided, minimize the length of road in these areas and direct the road away from them as quickly as possible. In addition, when it is necessary to cross these areas, the appropriate technical specialist(s) will be consulted (geotechnical specialist, wildlife/fish biologist, hydrologist, staff forest engineer, etc.).

Road Location

Road locations should minimize the risk of materials entering waters of the state and minimize disturbance to stream channels, lakes, wetlands and floodplains. Where viable alternatives exist, avoid locating roads on steep slopes, slide areas, or high-risk sites, and in wetlands, riparian management areas, channels or floodplains. When possible, avoid locating roads parallel to and in close proximity to streams because they have a higher than normal potential to deliver sediments directly into the channel. Roads that are close to and parallel streams also displace part of the riparian management area. Stream crossings will be as close as possible to a right angle in order to enter and exit the stream zone and the adjacent riparian management area as quickly as possible. Use variable grades and alignments to locate roads on the most suitable terrain.

Alternative road locations will be considered where natural resources are impacted. Locations will be favored that provide the best combination of meeting objectives and minimizing economic and environmental costs.

Make use of existing roads, where practical, to reduce the duplication of road systems and associated ground disturbance. Where roads are present on an adjacent ownership and the roads will adequately serve the planned forest management operation, investigate options for using those roads before constructing new roads.

Road Prism Design

Roads will be no wider than necessary to accommodate the anticipated use. See the ranges listed in the road design standards.

Roads will be designed to be constructed with a balanced cut and fill cross section where possible and where this does not pose a risk of slope instability. Where a balanced cross section is not used, excess excavation material should be used in the road design, when possible, and not wasted. Designs will call for full bench construction and end-hauling of excess excavation material when roads are located on steep slopes and/or high-risk sites.

To prevent fill failures, road designs will provide for stable fills by using compaction, buttressing, subsurface drainage, rock facing or other effective means.

Road Drainage

Good road drainage is one of the most important features designed into a road. The prompt removal of water from the road prism will help avoid many problems related to road construction and maintenance. Water is a critical factor affecting:

- Subgrade load bearing capacity (poor subgrade strength results in potential rutting caused by traffic)
- Slope stability
- Stream sedimentation

It is inevitable that roads will intercept, interrupt and interact with natural water flow patterns. The management of this interaction between roads and water is critical to a successful road system. Establishing proper drainage of water from roads and passage of water through roads is one of the most important techniques to minimize adverse impacts on water quality and aquatic habitat.

Surface Drainage

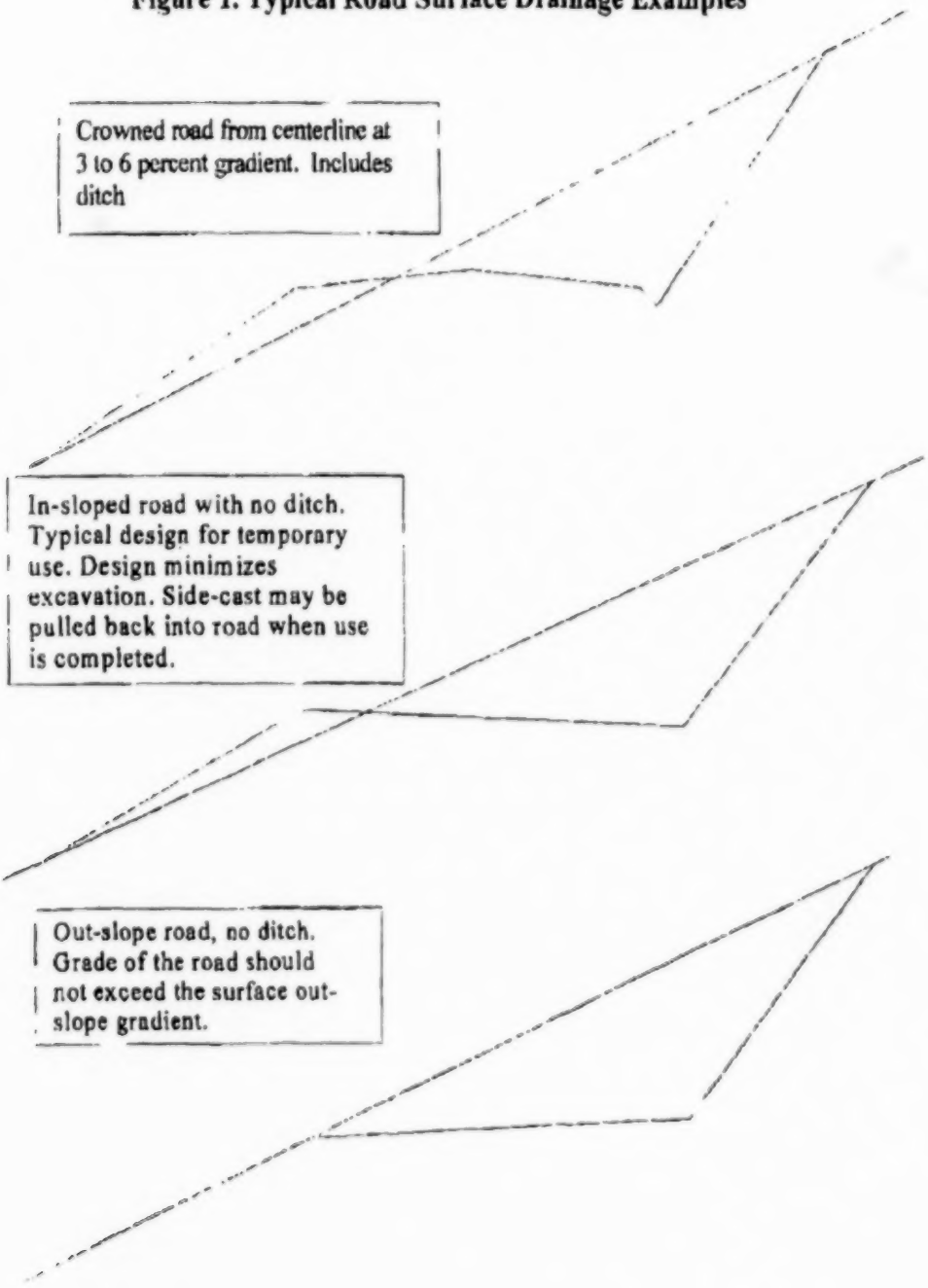
Good road surface drainage is important for keeping siltation to a minimum and to keep subgrades firm and stable to support the designed loads. Water intercepted by roads will be returned to natural flow processes as quickly as practical. Methods of achieving this are listed below.

1. **Subgrade shapes.** The running surface and subgrade must be shaped to move water off the road. Road surfaces will be crowned, in-sloped, or out-sloped for drainage. A "crowned road surface" is often preferred since it provides the shortest distance for water to travel off the road (from centerline to either road edge). Out-sloped roads can save on excavation and material costs since there is no ditch or cross drain. Outsloping will generally be limited to roads with grades less than 8 percent unless

they are temporary and will be closed or vacated after use. Water bars and water dips can also be used on temporary or very low use roads in lieu of a ditch. See "Figure 1. Typical Road Surface Drainage Examples" in this section.

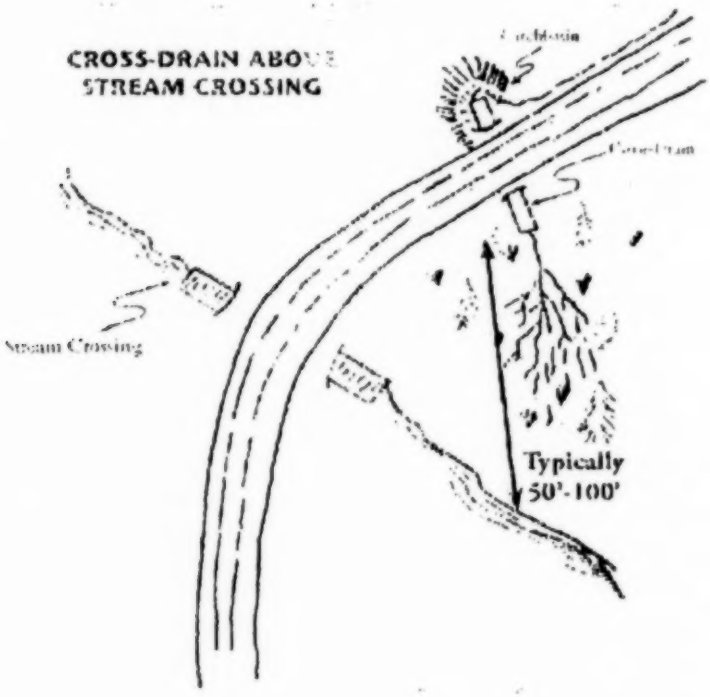
2. **Road Grades.** Road grades will be kept between 2% and 18% whenever possible. Flat grades will be avoided where possible; a minimum of 2% road grade will be favored to help to drain water out of the road prism. Steep grades above 15% should also be avoided. When steep grades are used, closer scrutiny of drainage for proper spacing of culverts, water bars, water dips, road grade reversals, and road surface maintenance is required.

Figure 1. Typical Road Surface Drainage Examples



3. **Drainage Structures.** A properly designed road will provide a drainage system using grade reversals, ditches, culverts, dips and/or water bars as necessary to effectively control and disperse surface water to minimize erosion of the road. Water will not be diverted from normal channels except as necessary to construct stream crossings. Drainage will be provided when roads cross or expose springs, seeps, or wet areas. Road drainage water should not be dispersed into headwalls, slide areas, or high-risk sites.

   Dips, water bars, or cross-drainage culverts should be located above and away from stream crossings so that road drainage water may be filtered before entering streams. Wherever possible, locate relief drainage 50 to 100 feet above stream crossings to eliminate the direct connection between road water and streams. The ditch-disconnect structure should be located in an area that will have at least 50 feet of filter distance to the stream.



   Ditch relief culverts will be placed at appropriate distances and locations along roads to prevent large accumulations of water running down ditchlines and to prevent direct discharge of ditch water into streams. See "Table 1. Guide Table for Water Bar and Relief Culvert Spacing".

Table 1. Guide Table for Water Bar and Relief Culvert Spacing

Recommended Maximum Spacing in Feet of Lateral Drainage

ROAD GRADE in %	SOIL EROSION RATING*		
	High	Normal	Low
0-4%	800	1000	1500
5-9%	500	800	1000
10-14%	300	400	500
15-19%	200	300	400
over 19%	150	200	300

**High* = *Cohesionless fine-grained soil*
Normal = *Sandy loam*
Low = *Rocky /gravelly soil*

The table above will be used as a guide. The road designer should also examine other roads in the immediate area to find out how well ditches and existing culvert spacings are performing. If necessary, the spacing should be adjusted to fit the local conditions.

The smallest culvert used will be 18 inches in diameter. Culverts smaller than 18" plug easily and present maintenance problems. Smaller diameter culverts will only be used in temporary applications where the culvert will be removed at the end of the use of the road.

Culverts will be located away from high-risk sites whenever possible, in order to disperse water on to stable locations (noses or ridges). When this is not possible, the geotechnical specialist will be consulted.

4. **Running surface.** The running surface of the road will be designed for the anticipated use. Rock surfacing can provide two important functions. First, a Layer of rock surfacing will help to spread vehicle tire loads over a larger area of the subgrade to help prevent rutting and subgrade failure. Secondly, a compacted layer of rock helps to seal the running surface, thus serving to move water away from the subgrade. Roads that will be open and used for hauling during wet weather will have rocked surfacing that will provide subgrade reinforcement and resist the erosive effects of water. Surfacing design is beyond the scope of this manual, however there are a number of factors identified below that will influence the decision to use surfacing and the types/amounts to use.

Advantages of rocking a road:

- Allows use of the road during wet periods
- Increases road subgrade strength, thus reducing the chance of wheel rutting during use.
- Provides a more stable, erosion resistant surface to the road, thus improving overall road drainage
- Provides base material (instead of dirt) that a grader can shape into a stable and longer lasting subgrade profile
- Reduces the amount of sedimentation produced by the road
- Reduces road maintenance needed to keep road performing properly
- Improves traction during wet weather
- All season access may increase the value of the area accessed for both commercial and non-commercial purposes. For example: reducing down time for wet weather could enhance the efficiency of a logging operation or a road could provide access for recreation throughout the year.

Disadvantages of rocking a road

- Cost, by far this is the single biggest factor - surfacing expense will often double the total cost of the road.
- May increase the cost to decommission the road in the future

Table 2 will be used as an aid in deciding when a road should be rocked and when it should not be rocked.

Table 2. Guidelines for Rocking a Road

Factors "for" rocking the road	Factors for "not" rocking
Road is in a coastal or valley climate	Road is in a dry climate such as Eastern or Central Oregon
Soil type is weak and poor draining, prone to erosion	Well drained gravely soil
Grade of road is steep, any water will have potential to run down the road and erode the surface	Gentle road grade, less than 8%
Road is close to a stream and could deliver sediments easily	Road is not near streams and there are filtering opportunities for runoff from the road prior to entering a stream
	Road is located on a ridge or high on the hill slope and there is little risk of damage from sedimentation.
The road use is permanent and access is needed throughout the year.	This is a one time or one season road use that could be timed to occur during dry periods of the year
It is not practical or possible to close the road during un-needed periods	The road can be vacated or closed after short-term use.
Heavy use is planned for the road; several million board feet of timber will be hauled over the road.	Only a small amount of timber hauling anticipated on the road, part of one sale for example.
	Operations requiring this road could be shut down during wet periods and access to other parts of timber sale could be operated on at that time.
Rock is readily available and relatively inexpensive.	Rock is scarce, must be hauled long distances and is expensive to apply.
High use recreation area that would make it difficult to keep traffic off road during wet seasons.	Road can easily and effectively be blocked until weather permits use.

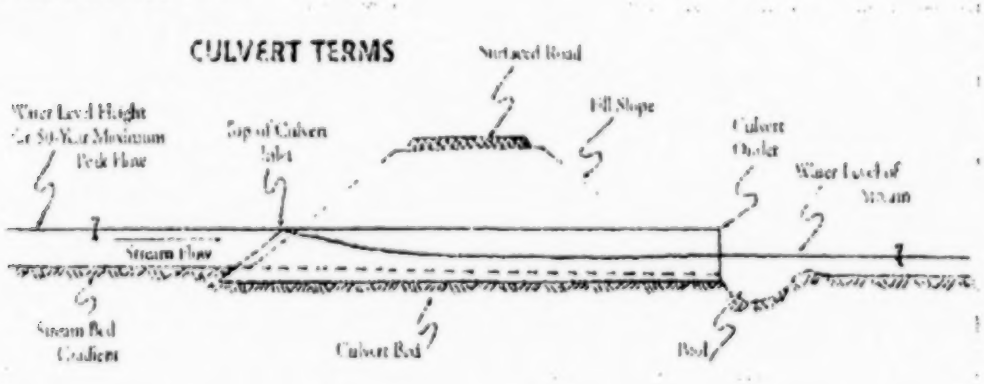
5. **Special Drainage.** Special drainage may be needed for areas containing springs or areas that have slope stability problems that are caused by subsurface water. The geotechnical specialist should be consulted for advice and assistance to design drainage structures that will help alleviate problems in these areas.

Design of Stream Crossing Structures

Stream crossing structures must protect aquatic and riparian habitats and provide fish passage, as well as preserve the stability and use of the road. The following requirements must be considered when designing stream crossings:

1. Streams will be kept in their natural channel and not diverted to crossing structures.
2. The number of acres in the drainage above the stream crossing structure will be determined from orthophotos, maps, aerial photography, or other comparable methods. This information is needed to determine the appropriate size for a stream crossing structure.
3. As a minimum, all new stream crossing installations or replacements of existing crossings will be sized to pass stream flow levels as predicted by the 50-year storm return interval. The Oregon Forest Practices Act guidance provides a culvert-sizing design method that can be used for minimum design standards of stream crossings on state-owned forest lands.
4. Include design features that will minimize damage in the event the structure becomes plugged and fails. In many cases this is more effective than simply designing larger structures for larger storm events. Designed safety features may include some or all of the following:
   - Lowered fill heights to minimize back-watering effects and dam break floods.
   - Dips in the road, downgrade from the stream crossing, that would divert water off the road and onto the best available locations.
   - Armored fills at stream crossing and/or dip locations.
   - Overflow culverts
5. Road crossings over fish-bearing streams will be designed to allow fish passage. The design of stream crossings will follow the guidance in **Oregon Road/Stream Crossing Restoration Guide: Advanced Fish Passage Training Version. Oregon Department of Forestry. Spring 1999** (or later version, if available)
6. All permanent bridges will be designed and approved by a licensed civil engineer.

FISH PASSAGE . . .



Temporary Road Design by Purchasers of Timber Sale Contracts

At times the purchaser of Department timber sale contracts will request and/or the Department will require that the purchaser locate, design, and construct temporary roads to facilitate the logging of Department of Forestry timber sales. This approach enables the purchaser to match road and landing locations with the planned yarding system. When this approach is used, the location and design of the roads and landings will be approved by the Department as part of the Operations Plan required by the timber sale contract. Roads and landings designed under this approach will meet all of the goals and objectives of this section of the manual. Variances from the procedures, standards and criteria set forth in this section of the manual must be approved the Department.

Since these roads are temporary, consideration will be given to vacating the road at the completion of use. If the Department does not need the road for management purposes (i.e. site preparation, reforestation, animal damage control, vegetation management, etc.), the Operations Plan should include the requirement for the purchaser to prepare the road for vacation. (See Section 8 on Forest Road Vacating)

Road Design by Easement Holders

At times adjacent landowners will be granted easements to construct roads across state-owned forest land in order to access their property. When these easements are granted, the Department will approve the location and design of the roads on state-owned forest land. The design of the roads will meet all of the procedures, criteria, and standards included in this section of the manual.

Road Construction

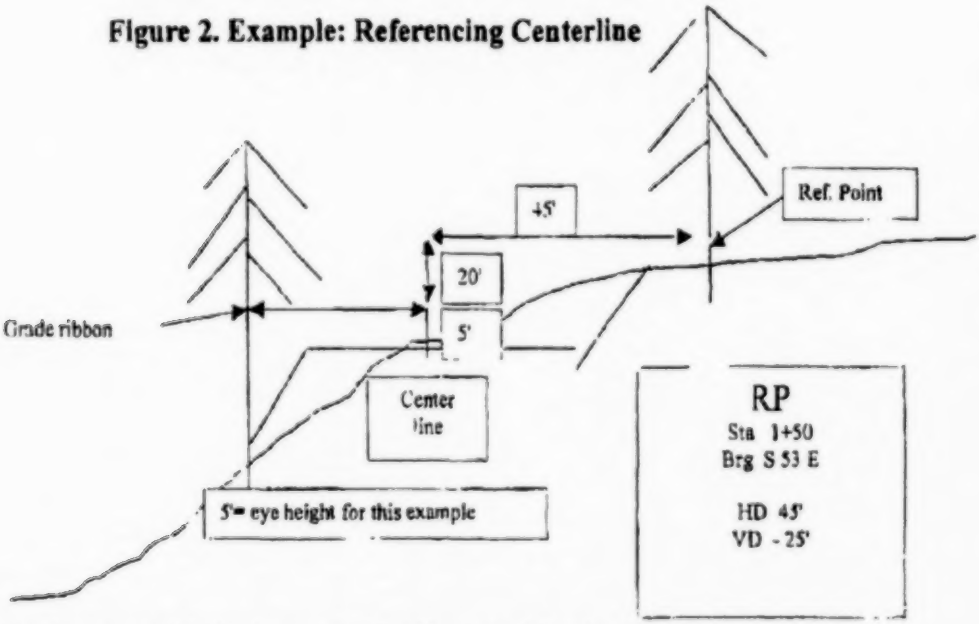
The design of a road construction or reconstruction/improvement project will include specifications that will minimize adverse impacts during the construction phase. Items to include are:

- Limiting construction activities to drier periods of the year, especially any activity involving exposed soil such as grubbing, excavation or grading.
- Curtailing activities on exposed soil during rain events, even when they occur during the dry season.
- Establish and maintain drainage throughout the construction phase.
- Take precautions to prevent siltation when rain is likely to occur. Precautions include hay bales, filter cloth, or other measures placed in ditch lines or other strategic locations to filter runoff water.
- When in-stream work is necessary, it should be accomplished during seasonal periods recommended by a fish biologist. A written plan is required by the Oregon Forest Practices Act and must be approved before working in a Type F (fish bearing) or Type D (domestic use) stream.
- Soils exposed by road construction or improvement that could enter streams will be seeded with grass or other vegetation to prevent erosion. These areas will be

seeded at a time conducive to growing new grass and prior to the start of the wet season. Spring and fall periods are generally preferred for grass seeding.

Referencing Centerline Location Centerlines on new roads and road improvement projects are referenced so that the centerlines may be located at any time during or after construction. The number of reference points needed will vary and should be determined by the complexity and sensitivity of the project i.e. the more complex and/or the more sensitive the project, the more reference points that should be established.

Figure 2. Example: Referencing Centerline



A typical reference tag (4" aluminum tag) should have the following information or more if desired:

- Stationing.
- Bearing to centerline.
- Vertical and horizontal distance to centerline.

Reference spacing guidelines are:

- Slopes less than 50%: reference every 200 to 300 feet.
- Slopes greater than 50%: reference every 100 to 200 feet.
- Critical end haul areas: reference every 50 to 100 feet, or as needed.

The most common method of establishing road grade is to tie grade ribbons so that when your eyes are level with the ribbon your feet are on grade. In order to mark a reference tag you need to measure and calculate the following:

- Horizontal distance from tag to centerline.
- Vertical distance from tag to grade ribbon plus eye height.
- Bearing to centerline point and stationing.

The information on the reference tag will represent distances and bearings from the tag (not the ground) to the centerline of the designed road at the grade (ground) elevation.

Culvert Referencing

All culvert installations will be referenced with a 4" aluminum tag prior to the completion of road design work. The standard reference tag shall have the following information as a minimum:

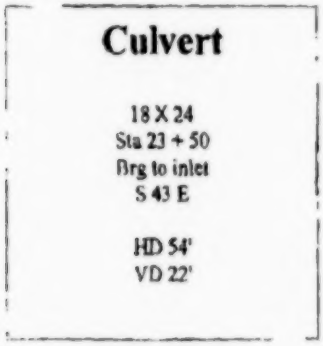
- Structure description, i.e., "culvert".
- Stationing.
- Size of culvert, i.e., "18 x 24'

Optional information:

- Attachments such as 1/2 rounds.
- Horizontal and vertical distance to culvert inlet, outlet.
- Bearing to either end of culvert
- Skew angle of culvert.

It is also a good idea to paint culvert information on the tree in case the tag falls off.

Figure 5. Example: Culvert Tag



Some surface drainage culvert locations are more apparent after the subgrade is constructed, particularly on low use roads where the constructed road may vary slightly from the design. The project administrator may relocate relief culverts in these instances.

Cut and Fill Slopes

The angle of the cut and fill slopes of a road can have a significant impact on the amount of ground taken up by the road and the stability of the hillside in the area around the road. The steeper the road slopes are, the less ground that is taken up by the road prism. The main problem with steep cut and fill slopes is that they can become unstable if they are constructed overly steep. The following table provides guidelines for cut and fills slope angles that will minimize slope instability and the foot print of the road on the hillside.

Table 3. Road Cut and Fill Slopes Angle Guidelines

Material	Compacted Fill Slope	Sidecast Fill Slope	Cut Slope
SOIL			
Silty sand			
No groundwater *High groundwater	1.5:1 2:1	2:1 3:1	.75:1 1.5:1
Soft clay, silts	Variable		
Sandy gravel			
No groundwater *High groundwater	1.5:1 1.75:1	1.5:1 1.5:1	.75:1 1.5:1
ROCK			
Solid – Fresh			**.25:1 to Vertical
Weathered – Stained			.25:1 to .75:1
Partially decomposed rock			.75:1 (with extra maintenance for ravel) 1.5:1 (slope with no ravel)
Cemented sands, silts, gravels			Vertical or .25:1

* May require special drainage, buttress, or other means of stabilization.

** With controlled blasting the back-slope will not shatter, and vertical slopes are usually the best design unless there is rock structure, bedding, jointing or fracturing which dips steeply out of the road cut. If this is the case, cut angle should be equal to the angle of the rock structure.

Contact the geotechnical specialist for "special problem rock slope design recommendations."

Landings and Turnouts

Landing size requirements vary with size and kind of equipment, log size, loader configuration (heel boom, front end, etc.), sorting situation, cold decking vs. hot decking, the possibility of skidding logs to a different loading area, yarding configuration, lead (square, straight, V), and other factors.

Landing size should be:

- Large enough to heel and swing logs without striking standing timber, rigging, or other equipment or objects. Operators will be directed to keep landings as small as possible. The maximum size should not exceed 1/5 acre.
- Long and level enough so that at least 2/3 of the longest bucked log to be yarded will rest on the ground. (Exception: this is not intended to restrict the yarding or loading of logs for poles piling, or an infrequent long break or tree length, provided the log is secured before unhooking the choker.)
- See figures 6 snd 7 (this section) for landing size examples.

Figure 6. Example of Road Bed Used as Landing

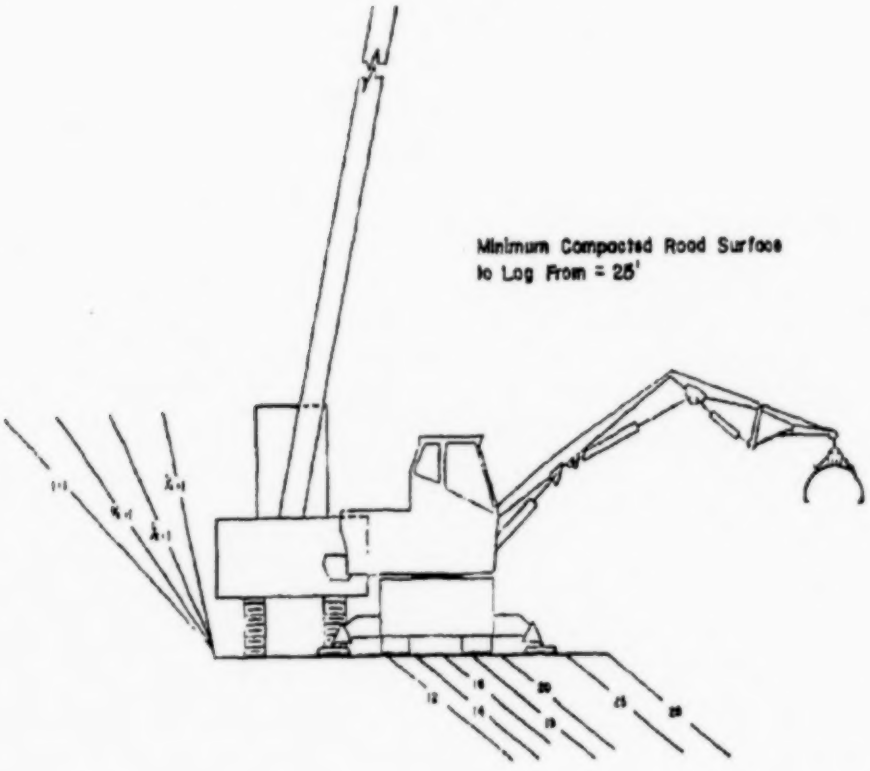
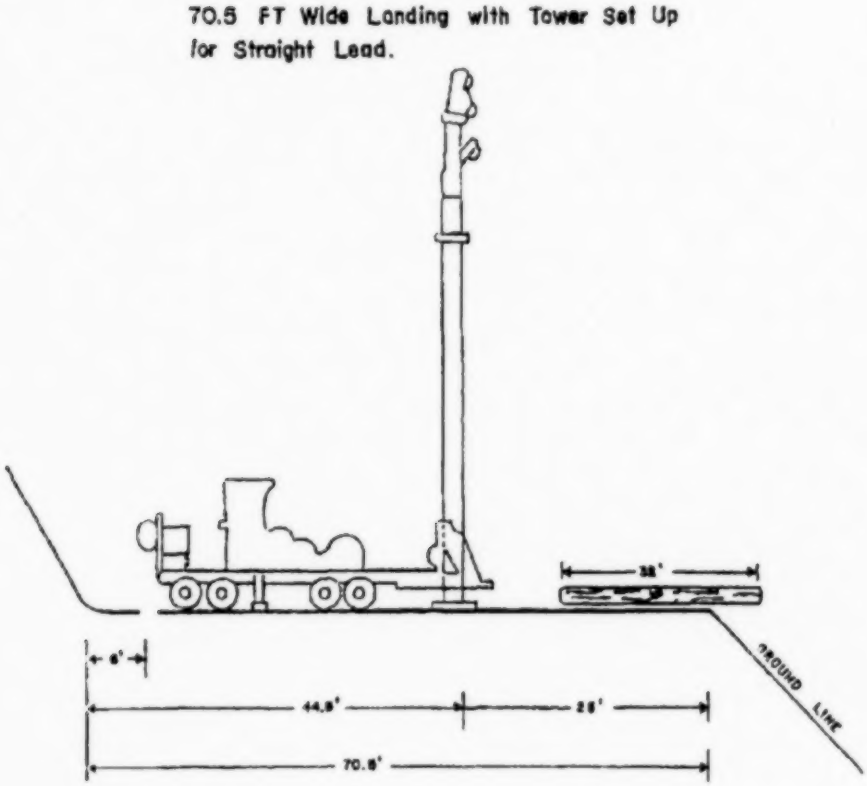


Figure 7. Example of Landing for Large Yarder



Landing construction should be:

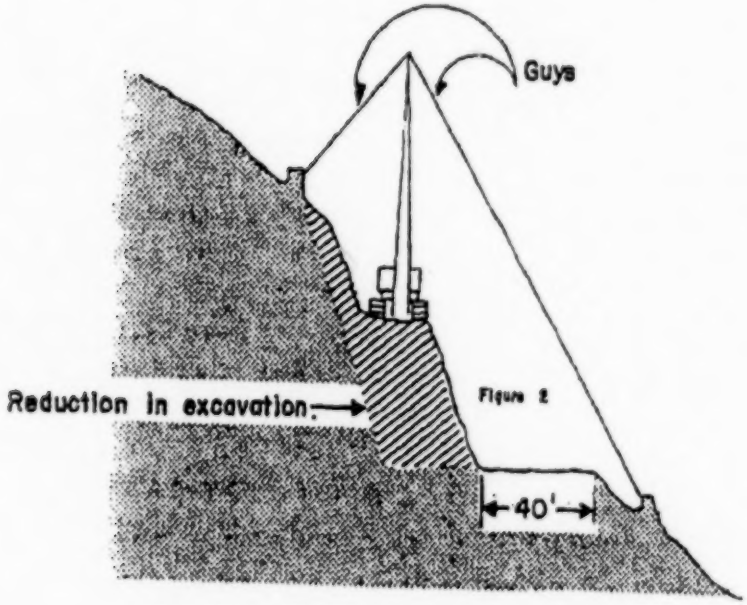
- Reasonably level but with enough slope to provide drainage. Maximum slope should not exceed 8 %.

  Usually an empty log truck ready for loading can start on about a 6 % grade, on a good crushed rock surface. If the truck has to maneuver on a steep grade, assistance may be needed.

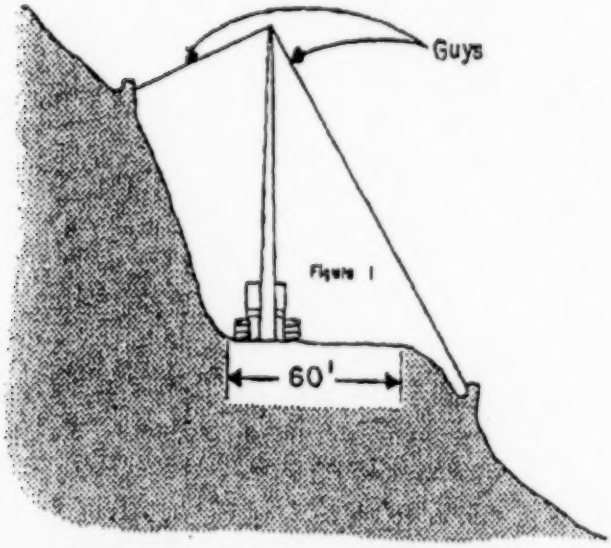
- The slope in log chute areas can be up to 20 % if logs are decked perpendicular to slope. High decks will require flatter areas.

- Split-level construction can often save up to half the excavation required for a single level landing. See Figures 8 and 9 this section for example of split-level landing construction.

Figure 8. & Figure 9.



SPLIT LEVEL UPHILL SETUP



NORMAL UPHILL SETUP

- Cut and fill construction can save excavation, but avoid landing fills on slopes over 50 % because of the likelihood for these fills to become overhangs of mixed dirt and slash during use. Such overhangs may slide out years after use, causing

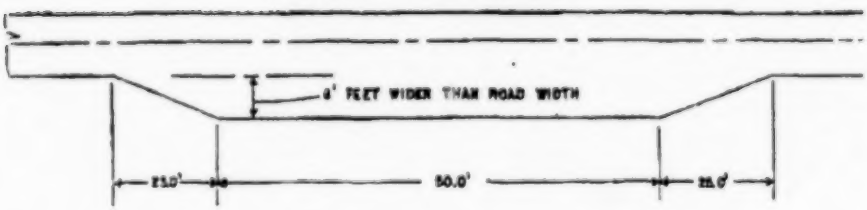
soil and stream damage below. Consider end hauling the clearing and grubbing debris around landings where slopes are 50% or greater, due to the slope instability potential and safety hazard for the loggers working below the landing. Do not place landing fill on slopes over 65%.

Turnouts are to be intervisible with a maximum road distance of 750 feet between turnouts on mainline roads. Turnouts on shorter spur roads may be placed where the terrain allows. Since speeds are reduced on spur roads and most logging operations now use CBs it is not as important that turnouts be intervisible. They should be at least 8 feet in width and 50 feet long with a 25-foot transition at each end. (See Figure 10 for diagram of typical turnout and Figure 11 for diagram of typical turnaround

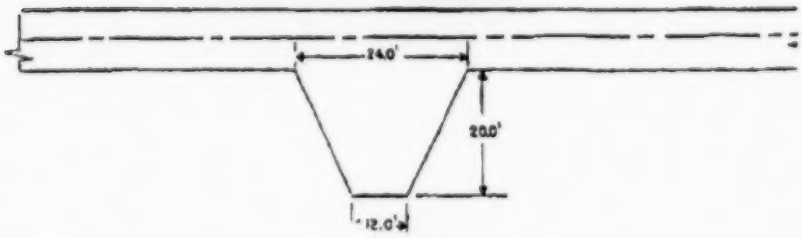
Figure 10. & Figure 11.

LOGGING ROAD SPECIFICATIONS.

TYPICAL TURNOUT



TYPICAL TURNAROUND



Curve Widening

The rear wheels of most vehicles will not track in the same path as the front wheels when traveling around a curve. This is called off-tracking. Extra subgrade and surfacing width may be necessary on the inside of the curve to accommodate the off tracking of the rear wheels. The amount of curve widening needed depends on the type of vehicle, the original subgrade width, the radius of the curve, and the central angle of the curve.

There are three critical types of vehicles that travel forest roads that may be impacted by curve width: the log truck, the logging yarder (on wheels), and the lowboy truck and trailer. The standard log truck tracks the best of these three, due to the configuration of the truck utilizing a stinger as the attachment point for the trailer. The logging yarder does not track as well as a log truck, due to its longer wheelbase. Finally, the lowboy truck will not track as well as the yarder, due to the long wheelbase of the truck and the longer wheelbase of the trailer. The trailer-mounted yarder pulled by a truck will usually off-track somewhere between the lowboy and self-propelled yarder. Sometimes yarders can be moved around corners with crawler tractors or other assist vehicles, which could improve their tracking ability on a temporary basis.

Since roads on state-owned forest land are designed as logging roads and not highways, not every factor will be evaluated in calculating extra curve width. The rule of thumb below, while not exact, will provide adequate curve width for the following vehicles.

Log Trucks and Yarders

Rule of Thumb: 400 divided by the radius = additional curve width

For a narrow subgrade (under 16 ft.), additional widening may be necessary, since the margin of safety or error for off-tracking on a narrow road would be less than on a wider subgrade. The amount of subgrade width less than 16' will be added on to the curve-widening formula as shown below.

Rule of Thumb: (400 ÷ Radius) + (16' - subgrade width) = additional curve width

Lowboy Truck and Trailer

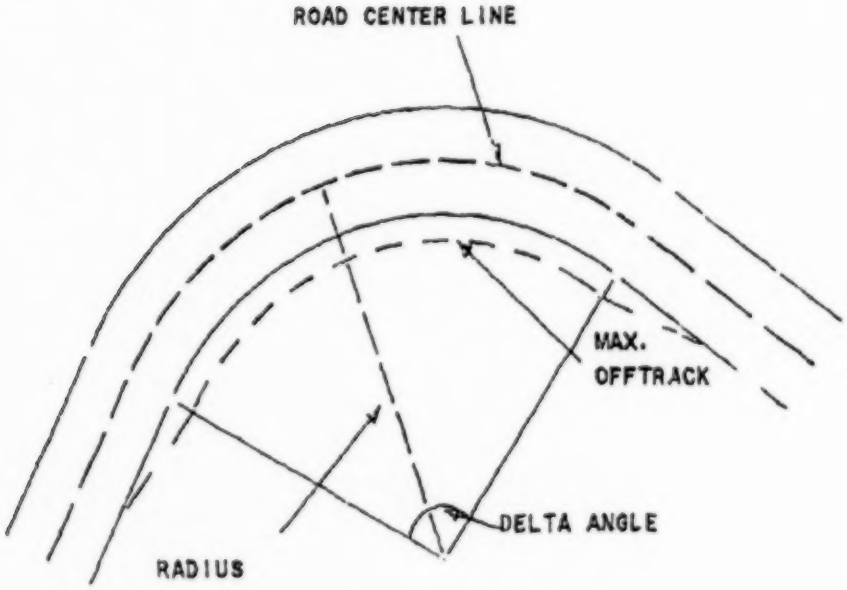
See Appendix 2 for Maximum Vehicle Off-Tracking for lowboy trailer (36'). The amount of off-tracking equals the amount of curve widening needed.

Good judgement and engineering skills must be used to design roads when vehicles with long overhangs will be traveling around curves. A vehicle such as a yarder with the tower down and traveling around a curve may have clearance problems with the cut-slope on the outside of the curve. This is particularly problematic for narrow roads with vertical cut-banks in solid rock.

Note: curve widening is normally added to the inside of the curve. If curve widening is to be put on the outside of the curve, the radius of the curve is effectively changed and the amount of road width needed for that radius curve will be calculated.

Figure 12.

MAXIMUM VEHICLE OFF TRACKING
ON SIMPLE CURVES



Maximum Vehicle Off-tracking on Simple Curves

Maximum Vehicle Off tracking

On Simple Curves

Vehicle: 36 ft. Lowboy Trailer

Curve Rad. (ft)	Delta angle (deg.)	Off Track in ft.
50	10	2
50	20	4
50	30	5
50	40	7
50	60	9
50	80	11
50	120	13
50	180	14

Curve Rad. (ft)	Delta angle (deg.)	Off Track in ft.
60	10	2
60	20	4
60	30	5
60	40	7
60	60	8
60	80	10
60	120	11
60	180	12

Curve Rad. (ft)	Delta angle (deg.)	Off Track in ft.
70	10	2
70	20	4
70	30	5
70	40	6
70	60	8
70	80	9
70	120	10
70	180	10

Maximum Vehicle Offtracking

On Simple Curves

Vehicle: 21 ft. BU-199 Yarder (self propelled)

Curve Rad. (ft)	Delta angle (deg.)	Off Track in ft.
50	10	1
50	20	2
50	30	3
50	50	4
50	90	4
50	180	5

Curve Rad. (ft)	Delta angle (deg.)	Off Track in ft.
60	10	1
60	20	2
60	40	3
60	70	4
60	180	4

Curve Rad. (ft)	Delta angle (deg.)	Off Track in ft.
70	10	1
70	20	2
70	40	3
70	180	3

Forest Road Sediment and Drainage Monitoring Project Report for Private and State Lands in Western Oregon

February 20, 1998

Prepared for:
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Forest Road Sediment and Drainage Monitoring Project Report for Private and State Lands in Western Oregon

Summary

This is the second report completed as part of a four-year project to investigate the effectiveness of forest road drainage practices designed to minimize sediment delivery to streams. This investigation is expected to yield a list of recommended road drainage and construction practices for private and public forest land managers and agencies that regulate forest management activities in western Oregon. This report summarizes data collected during the summer and fall of 1995 and 1996, years two and three of this project. Road drainage and sediment delivery data were analyzed in a regional context, as well as broken into categories based on best management practices (BMP's). A final technical paper will be produced at the end of this project.

Objectives

1. Develop field methods that determine the sediment delivery potential from forest roads.
2. Survey discharge structures and their potential for sediment delivery to waters of the state on forest roads in each of the five western Oregon georegions.
3. Develop a forest road inventory and erosion hazard inventory protocol for landowners.
4. Develop a road management guidebook.
5. Develop a technical issue paper for the Board of Forestry.

Background

Forest roads are recognized as the greatest potential source of accelerated erosion associated with forest management. The original intent of this four year monitoring project was to evaluate the effectiveness of Oregon's forest practice standards to minimize delivery of surface erosion from forest roads to waters of the state.

The February 1996 storm caused many landslides, channel changes, and other effects to natural resources and private property in northwestern Oregon. The storm was an unusual, but extremely important event that provided a unique opportunity to test the effectiveness of forest practices developed over the last two decades.

This report summarizes monitoring activities conducted during the summer and fall of 1995 and 1996. The data set reflects years when the relative importance of chronic surface erosion versus episodic landslide erosion as sources of sediment may have differed.

Methods

This report includes data that was collected during the summer and fall of 1995 and 1996. The method used to select areas to be surveyed differed each year. In 1995, all accessible roads within a randomly selected township, range and section were sampled to obtain at least 10 miles of road length. Where the randomly selected area (township, range and section) did not contain 10 miles of road, the sampling boundary was extended until that length of road was encompassed. Land in federal ownership, agricultural or urban landuse or dominated by large waterbodies was not sampled.

Areas sampled in 1996 were chosen using two different methods. First of all, three 10 square-mile areas of the highest landslide density observed after the February 1996 storm were selected non-randomly by the Oregon Department of Forestry (ODF) and are called the "red" zones. Secondly, areas of similar landscape, climate and geology but with low-landslide density were identified and three areas were randomly selected from these areas, one to pair with each of the "red" zones.

Forest roads in each of the five western Oregon georegions were sampled in 1995. During the 1996 survey, only three georegions were sampled (Coast Range, Interior, Western Cascades), thus the South Coast and Siskiyou georegions are represented by only the 1995 data. The Oregon forest practice rules (ODF 1997) use the term "geographic region" to describe large areas with similar climate, geomorphology and natural vegetation. There are five geographic regions in western Oregon:

1) Coast Range – Characterized by marine sandstone geology, high annual rainfall and steep coastal mountains.
2) Western Cascades – Characterized by volcanic geology, high annual rainfall and is generally mountainous.
3) Interior – The foothills on either side of the Willamette Valley.
4) South Coast – An area of unique geology and hydrology in Oregon that consists mainly of sheared metamorphic rocks and has the highest instantaneous maximum streamflows in the state.
5) Siskiyou – Highly variable geology and average annual rainfall ranges from 20 to over 100 inches.

Information gathered

The same methods were used to collect data in both 1995 and 1996 although the codes used for some road classifications and characteristics differed slightly. The data gathered included:

1) Road characteristics;
2) Condition of sample road segments (between surface discharge points); and
3) The location of surface water discharge points, including their potential to deliver sediment to waters of the state.

1) General Characteristics

The following data was collected to characterize the road:

a) Legal description (section, township, range) and name;
b) Forest practices maintenance status (active, inactive or vacated); and
c) Road surfacing material (clean rock, dirty rock or dirt).

2) Source Area

The source area of a surface water discharge point is the length of road draining to that point. Information was gathered for every road segment in the survey area. The information collected was used to evaluate the potential of the road to generate sediment for delivery to a surface water discharge point. This information was also used to evaluate road BMP's for erosion control and dispersal of surface waters.

The length and slope of each road segment was measured. Road design was categorized as crowned, insloped or outsloped. The condition of the ditch and the height and vegetative cover of the cutslope were also determined.

3) Discharge

Surface drainage points from the road include cross-drainage culverts, live stream crossings, waterbars, rolling dips, grade breaks, saddles, and random points of discharge. Information on drainage characteristics and potential sediment delivery at all surface drainage points was collected.

The diameter of all cross-drainage and live stream crossing culverts was measured. Culvert condition was estimated as the amount of the culvert inlet remaining open expressed as a percent. Where the culvert inlet was reduced, the cause was recorded as mechanical crushing, filling by debris or age related deterioration.

The culvert outlet or other discharge point was examined for evidence of sediment delivery to waters of the state. Discharge directly into a stream or a gully connected with a stream was rated a "yes" for delivery. Discharge points with either no evidence of erosion or deposition at the outlet or no evident pathway for sediment to enter the waters of the state were rated "no" for sediment delivery. All other discharge points rated "possible" for sediment delivery.

4) Data Collection

The length of each road segment was measured using a distance measuring instrument (DMI) that was installed in the vehicle and recorded distance in feet. A hip chain was used for distance measurements when roads could not be driven. A clinometer was used for slope measurements.

1995 Survey Comparison

This report summarizes the combination of the 1995 and 1996 ODF forest road drainage and sediment delivery surveys. The 1995 data is summarized in a 1996 report to the Department of Environmental Quality (ODF 1996a). To the length of road surveyed in 1995, 61 miles (324,141 feet) were added to the Coast Range georegion, 72 miles (380,876 feet) were added to the Interior georegion and 28 miles (148,278 feet) were added to the Western Cascade georegion by the 1996 survey. No survey data was collected in 1996 in the Siskiyou or South Coast georegions. The number of surface drainage discharge points surveyed approximately doubled from 1,398 to 2,810.

Delivery to Streams

Of the 285 miles (1,506,067 feet) of forest road surveyed in the five georegions, 25 percent drained directly to streams and another 6 percent were rated "possible" for sediment delivery. A total of 31 percent of the road length surveyed had a "yes" or "possible" delivery rating. Within the georegions, the combined "yes" and "possible" ratings ranged from 23 percent of the length of roads surveyed in the South Coast up to 47 percent in the Siskiyou georegion.

Spacing of Drainage Systems

The spacing between surface drainage discharge points ranged from 0 feet (culvert installed at a high point in the road) to 7,516 feet. The average spacing between surface drainage discharge points was 455 feet for all georegions and ranged from 293 feet in the Siskiyou georegion to 512 feet in the Interior georegion. The average segment length of roads with a grade greater than 18 percent was 284 feet and increased to 538 feet on roads with grades of 5-8 percent.

The spacing between points of surface road drainage (road segment length between drainage points) was compared with the spacing recommended by Arnold (1957). Arnold's spacing criteria was developed based on experience in the Western Cascades. The spacing of inventoried drainage structures was compared with Arnold's recommended spacings for a silt-loam soil and a 1-2 in/hr rainfall intensity.

Table 3: Arnold's (1957) recommended forest road drainage spacings for a silt loam soil receiving 1-2 inches/hr of rainfall.

Slope Class	Excessively Spaced Segment (ESS) Criteria (ft)
0 – 4	1500
5 – 8	865
9 – 12	480
13 – 18	335
>18	250

South Coast georegion. The first two segments upslope of live stream crossings accounted for 74 percent of the length connected to waters of the state, though this proportion ranged from 90 percent in the South Coast georegion to 41 percent in the Siskiyou georegion. The average length of road segments that were rated "Y" or "P" and were located upslope of stream crossings was 475 feet for the whole database, 373 feet for the South Coast georegion and 502 feet for the Siskiyou georegion. This average length is only 20 feet more than the average road segment length for the entire database.

Road segments that were rated "Y" or "P" for sediment delivery, were directly upslope of stream crossings and were excessively spaced comprised 9 percent of the entire database. These excessively spaced segments constitute 42 percent of segments rated "Y" or "P" for sediment delivery that are adjacent to streams, which is not substantially different from the proportion of excessively spaced road segments in the entire road survey database (40 percent). Thus, the occurrence of drainage spacing that exceeds Arnold's spacing criteria is similar for both segments rated "Y" or "P" for sediment delivery upslope of stream crossings and for elsewhere in the road network. However, the small sample size of this group of data suggests that such conclusions be drawn with caution.

Drainage System Characteristics

There were 2,810 surface drainage discharge points surveyed that drained 3,308 road segments (some surface drainage discharge points drained two road segments). Of these surface drainage discharge points, 714 (25 percent) were cross-drain culverts, 498 (18 percent) were live stream-crossing culverts and 18 (1 percent) were bridges. Additional drainage points included 306 waterbars, 305 ditch relief points, 210 grade breaks and 54 "other" drainage features. Non-engineered surface drainage occurred at 398 points and represented 14 percent of the data.

The majority (58 percent) of the drainage points rated "Y" or "P" for sediment delivery to waters of the state were live-stream crossing culverts. Another 19 percent of the drainage points that delivered to streams were cross-drain culverts. Non-engineered or random drainage points were less than 10 percent of the drainage points that delivered sediment to streams. The average road segment length that was drained by cross-drain culverts or live-stream crossing culverts was not appreciably different from the average for the entire database.

Over half (56 percent) of the live-stream crossing culverts were completely open and 10 percent were at least 51 percent obstructed. The degree of obstruction ranged from 91 percent of live-stream crossing culverts in the South Coast georegion that were completely open to 39 percent in the Coast Range georegion. Only 46 percent of all cross-drain culverts were completely open and 14 percent were at least half blocked. Nineteen percent of the cross-drain culverts surveyed in the Siskiyou georegion were completely open and 28 percent at least half blocked as compared to 78 percent being completely open in the South Coast georegion. However, this data represents a small

sample size of cross-drain culverts and live-stream crossing culverts in the Siskiyou georegion compared to the other georegions.

Table 5: Summary of road drainage features inventoried.

Drainage Type	Number	Percent
Cross-Road Culvert (Single)	714	25
Cross-Road Culvert (Multiple)	3	0
Stream-Crossing Culvert (Single)	498	18
Stream Crossing Culvert (Multiple)	10	0
Bridge	18	1
Ditch Relief	305	11
Water Bar	306	11
Non-Engineered Relief	398	14
Grade Break	210	7
Road Junction	290	10
Outsloped Road Construction	4	0
Other	54	3
Total	2,810	100

Table 6: Summary of road segment data by drainage feature type for the entire database and for segments definitely or possibly connected to waters of the state.

Drainage Feature	Entire Database				Possible and Positive Sediment Delivery to Channels					
	Discharge Length (ft)				Drainage Feature (DF)		Discharge Length			
	No. Rd. Segments	Total Length (ft)	Avg (ft)	% of Total	No. DF	% of Total (of DF)	No. Rd. Seg.	Total Length (ft.)	Avg. (ft.)	% of Total (of DF)
Cross-Road Culvert (Single)	861	424,269	493	28	158	5 (18)	181	89,544	495	6 (19)
Cross-Road Culvert (Multiple)	4	2,601	650	0	2	0 (0)	2	601	301	0 (0)
Stream-Crossing Culvert (Single)	619	292,015	472	19	493	15 (58)	613	287,277	469	19 (62)
Stream Crossing Culvert (Multiple)	15	11,097	740	1	10	0 (1)	15	11,097	740	1 (2)
Bridge	22	11,629	529	1	13	0 (2)	14	5,762	412	0 (1)
Ditch Relief	324	180,046	556	12	22	1 (3)	23	11,812	514	1 (3)
Water Bar	309	67,429	218	4	55	2 (6)	55	11,994	218	1 (3)
Non-Engineered Relief	499	164,588	330	11	74	2 (9)	89	32,168	361	2 (7)
Grade Break	285	141,913	498	9	4	0 (0)	6	2,526	421	0 (1)
Road Junction	299	190,434	637	13	14	0 (2)	15	7,228	482	0 (2)
Outsloped Road Construction	4	1,109	277	0	0	0 (0)	0	0	0	0 (0)
Other	67	18,937	282	1	9	0 (1)	11	2,099	191	0 (0)
Total	3,308	1,506,067	455	100	854	31 (100)	1,024	462,108	451	31 (100)

Forest Roads, Drainage, and Sediment Delivery in the Kilchis River Watershed

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EXECUTIVE SUMMARY

This report describes the forest road system in the Kilchis River watershed. This inventory was generally conducted prior to major storms in 1995–96. The objective of this study was to determine the relative potential for forest roads to deliver sediment to the watershed. Roads were then reinspected to identify landslides and washouts. The study was designed for use in a watershed analysis of sediment delivery for the forested portions of the Kilchis River watershed.

Because of the significant alteration to slopes and channels, roads, rather than timber management, are the primary source of sediment from forest management activities in the west (Megahan and Ketcheson 1996). There are two ways to mitigate sediment delivery to streams: (1) reduce the volume of erosion through on-site control practices; and (2) reduce sediment delivery by increasing sediment retention on the hillside (Megahan and Ketcheson 1996).

Because of the high potential for sediment delivery to streams, many forestry best management practices deal with road construction and maintenance. A "best management practice" is a practice or combination of practices that, after problem assessment, examination of alternative practices, and public participation is determined to be the most effective and practicable means of preventing or reducing nonpoint source pollution to a level compatible with water quality goals. The State of Oregon regulates forest road construction and maintenance through the forest practice rules.

Research conducted over the last 40 years in the Pacific Northwest has investigated ditch erosion, condition of drainage structures, surface erosion, hillslope erosion, landslides, sediment travel and delivery, turbidity, and sediment budgets as related to forest roads. Over the period of this research, there have been major changes in accepted road management practices, and also major differences in year to year climate. Geology and soils also vary tremendously around the region. Therefore, quantitative results of any one study may have only very limited applicability to roads in the Kilchis River watershed.

Most of the forest roads in the basin were constructed between about 1920 (old railroad grades) and 1970. Roads have also been constructed over the past twenty years in the lower third (unburned) portions of the basin. A large but unknown percent of the old roads have been abandoned, and are no longer driveable or easily identified as roads.

Every "official" forest road (those used for forest management purposes since 1972) in the Kilchis watershed, or with drainage directed to the Kilchis watershed, was driven or walked to collect the necessary data. The field survey gathered information on: (1) general road characteristics; (2) the condition of surveyed roads in locations where sediment is generated (between discharge locations); and (3) specific locations of surface water discharges, including potential for sediment delivery to waters.

This survey evaluated 106.7 miles (172 km) of forest roads in the Kilchis River watershed. Twenty five percent of road segment length in the basin clearly delivered (flow and any sediment carried by the flow) to streams, while an additional 14% were given a possible delivery rating; a total of up to 39% possible delivery to channels.

A total of 57 landslides associated with the storms of 1995 and 1996 were identified. Forty-eight of the road- or landing-associated landslides that occurred during the winter of 1995–96 in the Kilchis watershed involved more than 10 yd^3 of material. In addition, there were 22 washouts which eroded > 10 yd^3 of

material. There were at least another 28 washouts of <10 yd^3 volume.

The percentage of the road system delivering sediments to streams in the Kilchis watershed (between 25 and 39%) was lower than the 57.3% reported by Wemple (1994) or the 75% reported by Reid and Dunne (1984). It was comparable with the 34% reported by Bilby *et al.* (1989). It was exactly the same as the western Oregon random survey (ODF 1996). Average segment lengths from stream crossings to the first cross drainages above the stream crossings was 436 ft (133 m), while average spacing for the entire road system was 381 ft (116 m). This suggests that roads are designed and maintained for efficient delivery of water to channels. This is in contrast to the current forest practices rules, which require filtering of muddy runoff water through the forest floor.

At the present time, the two principal surface erosion concerns in the Kilchis basin are:

1. excessive length of ditches routed to deliver sediment directly to channels, and

2. steep gradient roads (≥13%) with excessively spaced cross-drainage structures.

Landslides and washouts are clearly the dominant erosional processes associated with forest roads in the Kilchis watershed, especially in years when there are major storms. Analysis of the road-related landslides data will be conducted with the historical landslides analysis of the Kilchis watershed, and will be compared with the Wilson River Storm of 1996 monitoring study site, as well.

As part of this study and a similar study conducted over all of western Oregon, a road inventories protocol was developed for forest land managers use and to provide information needed in order to prioritize road management decisions, especially maintenance and repair activities. It is intended for priority use in areas where roads pose higher risks to anadromous fish and their habitats. This report also includes several specific recommendations for road managers in the Kilchis watershed.

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 28 2012
OFFICE OF THE CLERK

No. 11-347

In the Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Ninth Circuit should have deferred to EPA's long-standing position that channeled runoff from forest roads does not require a permit, and erred when it mandated that EPA regulate such runoff as industrial stormwater subject to NPDES.

RULES 24.1 AND 29.6 STATEMENT

Defendants-appellees below and petitioners here are Georgia-Pacific West LLC, Hampton Tree Farms, Inc., Stimson Lumber Company, and Swanson Group, Inc. Intervenor defendants-appellees below and petitioners here are American Forest & Paper Association, Oregon Forest Industries Council, and Tillamook County, Oregon.

Additional defendants-appellees below, petitioners in No. 11-338, are the Oregon State Forester and members of the Oregon Board of Forestry, in their official capacities.

Petitioner Georgia-Pacific West LLC (formerly Georgia-Pacific West, Inc.) is a privately held Oregon limited liability company, the sole member of which is Georgia-Pacific LLC, a privately held Delaware limited liability company. The ultimate, indirect parent of Georgia-Pacific LLC is Koch Industries, Inc. No publicly held company owns 10 percent or more of the membership interests or stock of Georgia-Pacific LLC or Koch Industries, Inc., respectively.

Petitioner Hampton Tree Farms, Inc. is a family owned corporation, the parent of which is Hampton Resources, Inc., a family held Oregon corporation. No publicly held company owns 10 percent or more of the stock of Hampton Resources, Inc.

Petitioner Stimson Lumber Company is a family owned corporation organized under the laws of Oregon. It has no parent company, and no publicly held company owns 10 percent or more of its stock.

Petitioner Swanson Group, Inc. is a family owned corporation organized under the laws of Oregon. No publicly held company owns 10 percent or more of its stock.

Petitioner American Forest & Paper Association is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. No parent corporation or publicly held company has a 10 percent or greater ownership interest in American Forest & Paper Association.

Petitioner Oregon Forest Industries Council is a mutual benefit corporation organized under the laws of Oregon and Section 501(c)(6) of the Internal Revenue Code. It has no parent corporation and no publicly held company owns a 10 percent or greater interest in Oregon Forest Industries Council.

Petitioner Tillamook County is a governmental unit of the State of Oregon, with a population of approximately 25,000 persons. About 44 percent of the land within the county's borders is State owned, most as part of Tillamook State Forest, and 93 percent of the County is classified as forest land.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 640 F.3d 1063. The opinion of the district court (Pet. App. 48a-68a) is reported at 476 F. Supp. 2d 1188.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2010. After the time to file was extended, petitioners filed a timely petition for rehearing and rehearing en banc on October 5, 2010. The court issued an amended opinion and denied the petitions for panel and en banc rehearing on May 17, 2011. Pet. App. 1a. This Court granted a timely petition for certiorari on June 25, 2012. Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced at 1 Joint Appendix ("1JA") 62-125.

STATEMENT

For more than 35 years, EPA's Silvicultural Rule has specified that precipitation runoff from forest "road construction and maintenance"—which includes the ditch-and-culvert drainage systems that are an integral part of nearly all forest roads—is "non-point source silvicultural activity" that does not require a Clean Water Act Section 402 permit. Instead, forest road runoff, whether or not collected in ditches, has been addressed through state best management practices adapted to local conditions.

When Congress in 1987 established a new two-phase process for regulating stormwater point source discharges, EPA confirmed that forest road runoff is not subject to Section 402 permitting. In promulgating Phase I regulations identifying discharges that are "associated with industrial activity"—for which Congress required permits—EPA provided that these "do not include" activities covered by the Silvicultural Rule. Then, when EPA considered under Phase II whether permits should be required for additional stormwater discharges not covered by the mandatory Phase I program, it did not designate runoff from forest roads in that category. Consistent with these rules, EPA has never required CWA permits for channeled forest road runoff.

The Ninth Circuit impermissibly rejected EPA's long-held position. It acknowledged that EPA *intended* the Silvicultural Rule to define precipitation runoff collected in ditches and culverts as nonpoint source, but refused to defer to EPA because it incorrectly believed that the CWA inflexibly defines this runoff as point source in nature.

That error by itself would not have been enough to impose a permitting requirement. The 1987 CWA Amendments require permits only for certain categories of point source stormwater discharges—as relevant here, those "associated with industrial activity." But the Ninth Circuit contorted EPA's stormwater regulations beyond recognition, reading them to define forest road discharges as "associated with industrial activities" despite EPA's plain intent to the contrary.

This Court should reverse. EPA's reasoned and consistent position is entitled to deference. EPA's interpretation of the CWA in its silvicultural and

stormwater rules was entitled to *Chevron* deference. EPA's interpretation of its own rules was entitled to *Auer* deference. The Ninth Circuit was not entitled to substitute its own views of appropriate environmental regulation for those of Congress and EPA.

Alternatively, this Court should order this suit dismissed for lack of subject matter jurisdiction. Though this case masquerades as a citizen enforcement suit, plaintiff sought and obtained invalidation of key aspects of EPA's rules. But rule challenges must be brought against EPA in a court of appeals within 120 days following promulgation of the rule. 33 U.S.C. § 1369(b). This is an out-of-time, filed-in-the-wrong-court and against-the-wrong-defendant rule challenge for which jurisdiction is lacking.

A. NEDC's Suit.

Plaintiff NEDC brought this purported citizen suit under CWA § 505, 33 U.S.C. § 1365, in September 2006. Defendants are forest products companies, petitioners here, and the Oregon State Forester and members of the Oregon Board of Forestry, petitioners in No. 11-338. American Forest & Paper Association, Oregon Forest Industries Council, and Tillamook County, also petitioners here, intervened in support of defendants.

NEDC's complaint (2JA 1-25) alleges that "ditches, channels, culverts, [and] pipes" along the Trask and Sam Downs Roads and at "hundreds of other locations" throughout Oregon State Forests discharge precipitation runoff into navigable waters without a National Pollutant Discharge Elimination System ("NPDES") permit. First Am. Cmplt. ¶¶ 1-6. NEDC alleges that petitioner companies use State-owned roads for hauling timber and maintain those

roads pursuant to timber sale contracts with Oregon's Department of Forestry. Petitioners' use of these public roads allegedly creates sediment and other pollutants that are carried by rain through roadside ditches into navigable waters. *Id.* ¶ 5. Plaintiff argues that these are point source discharges associated with industrial activity for which petitioners were required to obtain permits from Oregon's Department of Environmental Quality, to which EPA has delegated administration of the NPDES program. *Id.* ¶¶ 32, 77. NEDC seeks injunctive and declaratory relief, civil penalties, and attorneys' fees. *Id.* ¶ 1.

B. The Federal Statutory Context.

In enacting the CWA, Congress created a federal-state "partnership" "animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). Congress gave EPA defined powers over the Sections 402 and 404 permit schemes, but also chose "to recognize, preserve, and protect the primary responsibilities and rights of States" to address pollution and "plan the development and use" of "land and water resources." 33 U.S.C. § 1251(b); see *SWANCC* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 166-167 (2001); *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006).

Section 402 requires permits for "point sources" that discharge pollutants into U.S. waters. 33 U.S.C. § 1342(a); see CWA § 301(a), 33 U.S.C. § 1311(a). A "point source" is "any discernible, confined and discrete conveyance," including a "ditch, channel, tunnel [or] conduit," from which pollutants are discharged. CWA § 502(14), 33 U.S.C. § 1362(14). But the term

expressly "does not include agricultural stormwater discharges." *Ibid.* Nor does it include "[n]onpoint sources of pollutants," such as "agricultural and silvicultural activities" like "runoff from fields and crop and forest lands." CWA § 304(f)(1) & (2)(A), 33 U.S.C. § 1314(f)(1) & (2)(A). Congress expected EPA to further flesh out which discharges fall into the point and nonpoint source categories. As explained by Senator Muskie—the "leading Congressional sponsor" of the Act (*NRDC* v. *Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977))—"[g]uidance with respect to the identification of 'point sources' and 'nonpoint sources'" will "be provided in regulations and guidelines of the Administrator." 117 Cong. Rec. 38816 (1971).

The CWA initially did not expressly differentiate stormwater from other potential sources of pollution. But in 1987 Congress "fundamentally redesigned the CWA's approach" by creating a two-phase regime to address stormwater discharged from point sources. Pet. App. 35a. In Phase I, Congress required permits for the "most significant sources of stormwater pollution" (Pet. App. 36a), including "discharge[s] associated with industrial activity." CWA § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B). In Phase II, Congress required EPA to study whether additional types of stormwater discharge should be subject to permitting or other regulation. CWA § 402(p)(5)-(6), 33 U.S.C. § 1342(p)(5)-(6). Point source stormwater discharges not designated as requiring permits under Phase I or II were excluded from the NPDES program.

Beyond Section 402 and the separate Section 404 permit scheme for dredged-and-fill material, Congress largely left the task of addressing water pollution to the States, with federal assistance and over-

sight. See *The Clean Water Act Handbook* 191-220 (Mark A. Ryan ed., 2d ed. 2003). Consistent with its purpose to preserve the "primary responsibility and rights of States" in this area, Congress left States responsible for establishing water quality standards and developing programs to manage nonpoint sources of pollution. 33 U.S.C. §§ 1288, 1313(a), (d), 1329. In doing so, Congress recognized that "[b]est management practices" ("BMPs")—"including careful road placement [and] culverting"—would "reduc[e] runoff" from "silvicultural areas" and other nonpoint sources like "streets, roads, [and] highways." 132 Cong. Rec. 32396-32397 (1986) (statement of co-sponsor Sen. Durenberger); see also S. Rep. No. 99-50, at 35-36 (1985).

C. EPA's Silvicultural Rule.

Ever since passage of the CWA—as the Ninth Circuit acknowledged—EPA has "treat[ed] all natural runoff' from forest roads "as nonpoint pollution, even if channeled and discharged through a discernible, confined and discrete conveyance" like a roadside ditch or culvert. Pet. App. 22a.

1. EPA promulgated a rule in 1973 providing that "[d]ischarges of pollutants from agricultural and silvicultural activities" generally do not require NPDES permits. 40 C.F.R. § 125.4(j) (1975), 1JA 85. EPA explained that "the Act and the legislative history indicate clearly that Congress regarded" such discharges "as problems to be dealt with primarily through the exercise of authorities concerning nonpoint sources." 38 Fed. Reg. 10960, 10961 (May 3, 1973). As EPA later summarized, permitting "was not appropriate" for these sources because they "present runoff-related problems not susceptible to

the conventional NPDES permit program including effluent limitations":

> EPA's position was and continues to be that most rainfall runoff is more properly regulated under section 208 of the [CWA], whether or not the rainfall happens to collect before flowing into navigable waters. Agricultural and silvicultural runoff, as well as runoff from city streets, frequently flows into ditches or is collected in pipes before discharging into streams. EPA contends that most of these sources are nonpoint in nature and should not be covered by the NPDES permit program.

40 Fed. Reg. 56932 (Dec. 5, 1975).

A district court held EPA's 1973 rule too broad and suggested EPA use its authority to better define nonpoint source activities that do not require permits. *NRDC* v. *Train*, 396 F. Supp. 1393, 1401-1402 (D.D.C. 1975) ("Congress intended for [EPA] to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources"), aff'd *sub nom. NRDC* v. *Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977) ("power to define point and nonpoint sources is vested in EPA").

2. EPA promulgated the Silvicultural Rule in 1976. The rule identified four discharges—those "related to rock crushing, gravel washing, log sorting or log storage facilities"—as "silvicultural point source[s]." 40 C.F.R. § 124.85 (1976), 1JA 86-87. The rule stated in a "comment" that "silvicultural point source" does "not include nonpoint source activities inherent to silviculture" such as "harvesting operations," "surface drainage," and "road construction

and maintenance from which runoff results from precipitation events." *Ibid.* "[R]unoff from road construction and maintenance for the purposes of forest management" and "surface drainage" that "channel[s] diffuse runoff from precipitation events," EPA explained, "should be considered nonpoint in nature." 41 Fed. Reg. 24709, 24711 (June 18, 1976).

In promulgating the Silvicultural Rule, EPA "carefully examined the relationship between the NPDES permit program" and "water pollution from silvicultural activities" and "carefully considered" numerous comments. 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976); 41 Fed. Reg. 24709-24710. It concluded "that most water pollution related to silvicultural activities is nonpoint in nature." *Id.* at 6282. In explanation, EPA observed that those discharges are "induced by natural processes, including precipitation," are "not traceable to any discrete or identifiable facility," and are "better controlled through the utilization of [BMPs]." *Id.* at 24710. EPA agreed with commentators that "geographical, meteorological and topographical variations" made "State and local regulation of water pollution from silvicultural activities * * * more appropriate than Federal regulation," concluding that "the [Section] 208 process incorporating BMPs should effectively prevent and abate" such pollution. *Ibid.*

Accordingly, under the Silvicultural Rule, "ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject to the § 402 permit program," but are regulated under Section 208 by the States as "nonpoint in nature." 41 Fed. Reg. 6282.

3. EPA re-promulgated the Silvicultural Rule in 1980 with "[m]inor wording changes." 45 Fed. Reg.

33290, 33372 (May 19, 1980); 40 C.F.R. § 122.27(b), 1JA 103-104. The rule retained the four "silvicultural point sources." It moved the definition of "non-point source silvicultural activities" from a comment to the text, slightly modifying the language to provide that nonpoint source activities include "surface drainage, or road construction and maintenance from which there is natural runoff." 45 Fed. Reg. 33446-33447.

Substituting "from which there is natural runoff" for "from which runoff results from precipitation events" was not a substantive change. Following that change, EPA restated its "longstanding view" that runoff from forest roads, "*although sometimes channeled*," remains "non-point source in nature" because it is "caused solely by natural processes, including precipitation and drainage," is "not otherwise traceable to any single identifiable source," and is "best treated by non-point source controls." 55 Fed. Reg. 20521, 20522 (May 17, 1990) (emphasis added).

D. EPA's Stormwater Regulations.

1. In 1990 regulations implementing Phase I of Congress's stormwater amendments, EPA defined "discharge associated with industrial activity" to "not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). The Silvicultural Rule, at 40 C.F.R. § 122.27, fell within the scope of this reference. And EPA explained that it did "not intend to change the scope of 40 CFR 122.27 in this rulemaking." 55 Fed. Reg. 47990, 48011 (Nov. 16, 1990).

The Phase I regulation otherwise defined "discharge associated with industrial activity" to mean discharges "directly related to manufacturing,

processing or raw materials storage areas at an industrial plant," including "immediate access roads." 40 C.F.R. § 122.26(b)(14). "[I]mmediate access roads" are roads "exclusively or primarily dedicated for use by the industrial facility," not "public access roads such as state, county, or federal roads" that "happen to be used by the facility." 55 Fed. Reg. 48009.

EPA's rule also listed "categories of facilities" engaged in industrial activity, using as shorthand the federal government's Standard Industrial Classifications, and including facilities "classified as Standard Industrial Classification 24." 40 C.F.R. § 122.26(b)-(14)(ii). SIC 2411 is titled "logging" and refers to "[e]stablishments primarily engaged in cutting timber" and producing "primary forest or wood raw materials" "in the field." Pet. App. 39a-40a; see 2JA 64. But as EPA contemporaneously explained, the regulation "does not include sources that may be included under SIC 24, but which are excluded under [the Silvicultural Rule]" (55 Fed. Reg. 48011)—and therefore does not include "harvesting operations."

Environmental groups challenged aspects of EPA's Phase I regulations, but not those concerning forest roads or silviculture. See *NRDC* v. *EPA*, 966 F.2d 1292 (9th Cir. 1992); *id.* at 1312-1314 (O'Scannlain, J., dissenting in part).

2. In developing Phase II regulations, EPA reiterated that its Phase I regulation excluded "runoff from agricultural and silvicultural activities." EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program* 2-23 n.8 (Mar. 1995), 2JA 47. And in listing "Timber Products Facilities" that are "associated with industrial activity," EPA specifically identified cutting, planing, loading, sorting and storing logs, and manu-

facturing, assembling, and preserving wood products, but not logging. *Id.*, Appendix E, at E-2-3, 2JA 50-51.

EPA's Phase II rules designated two additional categories of stormwater discharge for NPDES permitting: small municipal storm sewer systems and some construction sites. 64 Fed. Reg. 68722, 68734 (Dec. 8, 1999). This approach reflected studies that showed urban storm sewers and construction were a much more serious source of pollution than silviculture. *Id.* at 68726-68727. See EPA, *Stormwater Phase II Final Rule, Construction Site Runoff Control, Minimum Control Measures* 1 (revised Dec. 2005) ("Sediment runoff rates from construction sites" are "1,000 to 2,000 times greater than those of forest lands").

An environmental group challenged EPA's decision not to require Phase II permitting for runoff from forest roads. The Ninth Circuit remanded the rule to EPA to explain its decision, but did not strike down the rule. *Envtl. Def. Ctr.* v. *EPA*, 344 F.3d 832, 861 (9th Cir. 2003). EPA took no public action on that remand until its recent Notice of Intent. 77 Fed. Reg. 30473, 30474 (May 23, 2012).

3. In 1999, EPA proposed modifying the Silvicultural Rule. EPA explained that "runoff" from "surface drainage [and] road construction and maintenance" is "[c]urrently" "categorically excluded from the NPDES program." 64 Fed. Reg. 46058, 46077 (Aug. 23, 1999). EPA proposed that this stormwater still "would not be considered 'stormwater discharges associated with industrial activity' under 40 CFR 122.26(b)(14)." But it suggested replacing categorical treatment with case-by-case consideration of permitting. 64 Fed. Reg. 46077-46078, 46088. Following

public comment, EPA decided not to pursue this proposal. 65 Fed. Reg. 43586, 43652 (July 13, 2000).

4. In a 2003 brief urging dismissal of a suit alleging that discharges from forest roads collected in "ditches, channels, pipes [and] culverts" must be permitted, EPA told the court that the phrase "discharge associated with industrial activity" "does not include discharges from facilities or activities excluded from the NPDES program under" Part 122.27, and that "[c]onsequently, EPA did not incorporate silvicultural storm water discharges into the definition of 'stormwater discharges associated with industrial activity.'" Pet. App. 86a-87a. And in its amicus brief to the district court supporting dismissal of this suit, the United States called for "[e]levated deference" because EPA "has 'consistently followed' the same interpretation of its regulations." Pet. App. 115a.

E. Oregon's Regulation Of Forest Roads.

Under this statutory and regulatory scheme, States regulate forest roads using BMPs adapted to their own "climate, soils, topography, and aquatic biota." Erik Schilling, *Compendium of Forestry Best Management Practices for Controlling Nonpoint Source Pollution in North America* 194 (Tech. Bull. 966, Sept. 2009). As Congress required, EPA assists States in developing "land use requirements" to address "silviculturally related nonpoint sources of pollution," including BMPs for road construction, maintenance, and management. 33 U.S.C. § 1288(b)(2)(F); see, *e.g.*, EPA, *National Management Measures to Control Nonpoint Source Pollution from Forestry* Ch. 3(c), (d) (May 2005), http://tiny.cc/EPA1; Karen Solari, *Forestry Best Management Practices in Watersheds* (2008), http://tiny.cc/Solari. As 26 States ex-

plained in their brief in support of the petitions (at 14), "BMPs have become an accepted, well-understood, documented, approved and successful method of protecting water quality."

Thus, under Oregon law, the Board of Forestry "insure[s] that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair" achievement of water quality standards. Or. Rev. Stat. § 527.765(1), (2), 1JA 107-109. The Board has promulgated "standards for locating, designing, constructing and maintaining efficient and beneficial forest roads" in a manner that provides "maximum practical protection" for "water quality." Or. Admin. R. § 629-625-0000(3). Roads must be located, constructed, and operated to minimize "risk of sediment delivery to waters of the state." *Id.* § 629-625-0330; see *id.* § 629-625-0200(2) & -0300(2). And to meet that goal, road operators must "provide a drainage system" that satisfies numerous criteria. *Id.* § 629-625-0330(1); see 1JA 109-125.

F. Proceedings Below.

The district court dismissed plaintiff's suit, deferring to EPA's position that, under the Silvicultural Rule, "building and maintenance of the forest roads" and "hauling of timber on the roads" are "not point sources when the natural runoff flows into the waters of the United States." Pet. App. 62a. The "road/ditch/culvert system and timber hauling on it is a traditional dispersed activity from which pollution flowing into the water cannot be traced to single discrete sources." *Ibid.* Given this holding, the court declined to address the Phase I scheme for point source stormwater discharges.

The Ninth Circuit reversed, rejecting EPA's views set forth as amicus. It first ruled that the CWA unambiguously defines "point source" to cover channeled silvicultural runoff. Pet. App. 32a. Alternatively, it held the phrase "natural runoff" in the Silvicultural Rule to be ambiguous. When read to "reflect the intent of EPA," "natural runoff" is nonpoint source even when "collected, channeled, and discharged." *Ibid.* But the court ruled that position "invalid" under the CWA's definition of point source. *Ibid.* The court imposed its own reading on the Silvicultural Rule—one that admittedly "does not reflect the intent of EPA"—that "channeled and controlled" runoff is point source activity. Pet. App. 32a-33a

The court next held that channeled forest road runoff is "associated with industrial activity." It acknowledged that EPA's Phase I regulation "purports to exempt" any "activity that is defined as a nonpoint source in the Silvicultural Rule." Pet. App. 38a. But it held that "EPA is not free" to do so if "silvicultural activity is industrial in nature." Pet. App. 39a. Ignoring the United States' argument that "EPA has not defined logging as an industrial activity" (1JA 43-44), the Ninth Circuit found it "undisputed" that logging "is an industrial activity." Pet. App. 39a, 42a. And it ruled that forest roads are "immediate access roads" "primarily dedicated for use by the logging companies," even though they "are often used for recreation." Pet. App. 40a.

On petitions for rehearing, the Ninth Circuit addressed subject matter jurisdiction. Pet. App. 5a-7a. According to the court, jurisdiction turned on whether the Silvicultural Rule is ambiguous. If the rule were *un*ambiguous, NEDC would have had to challenge it within 120 days of issuance, a window that

closed decades ago. 33 U.S.C. § 1369(b)(1). But the court held that the Silvicultural Rule is ambiguous, and that NEDC's challenge to it rests on "grounds which arose after such 120th day" because EPA set forth its interpretation of the rule for the first time in this litigation. Pet. App. 7a.

SUMMARY OF ARGUMENT

I. In requiring NPDES permits for channeled forest road runoff for the first time since passage of the CWA in 1972, the Ninth Circuit erred by failing to give deference to EPA's determinations that such permits are neither required nor appropriate.

A. The court of appeals held, first, that such runoff is a "point source" discharge under Section 502(14) of the CWA. But EPA concluded precisely the opposite when it promulgated the Silvicultural Rule, which for the last 36 years has provided that stormwater runoff, even if channeled through culverts and ditches, is not a point source discharge. That rule resolves an ambiguity in the statute's definition of "point source" and—as the product of EPA's considered, expert judgment—is entitled to substantial deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Ninth Circuit alternatively interpreted the words "natural runoff" in the Silvicultural Rule not to include channeled forest road runoff. But that holding runs squarely counter to EPA's longstanding interpretation of its own regulation, which is entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). EPA's rational and expert interpretation of the Silvicultural Rule has been enforced consistently for decades. It represents EPA's fair and considered judgment and is in no way a *post*

hoc rationalization advanced to defend past agency action against attack.

Giving EPA's interpretations of either the CWA or Silvicultural Rule proper deference requires reversing the judgment below.

B. The Ninth Circuit next held that channeled forest road runoff is a point source discharge "associated with industrial activity" within the meaning of the 1987 stormwater amendments to the CWA and EPA's implementing regulations, and that it therefore requires a permit. That also is incorrect.

The plain language of EPA's Phase I regulation makes clear that runoff from roads that are not "at" or "within" an industrial "facility," like those at issue here, is *not* a discharge "associated with industrial activity." In addition, EPA's regulation of stormwater associated with industrial activities explicitly excludes from its coverage activities deemed nonpoint source by the Silvicultural Rule—including "harvesting operations," *i.e.*, logging, as well as forest road construction and maintenance. Accordingly, EPA consistently has rejected the Ninth Circuit's contorted reading of the regulation, both in practice and in regulatory pronouncements and briefs submitted at all levels of this and other litigation. The Ninth Circuit misread the plain language of the regulation, and in any event should have deferred to EPA's longstanding interpretation under *Auer*. On this independent ground too, its judgment must be reversed.

C. The deference due to EPA's views concerning the CWA and its implementing regulations is a matter of more than mere legal formality. Disregarding those views and requiring permits for channeled for-

est road runoff would impose astronomical costs on both regulators and the regulated, inject pervasive confusion into forest road management, and undercut EPA's environmental protection mandate. Interpretations of statutes and regulations that undermine the achievement of an agency's ultimate mission in this way are strongly disfavored.

II. This Court should alternatively vacate and remand with instructions to dismiss the suit for lack of subject matter jurisdiction. The CWA provides limited subject matter jurisdiction (1) in the courts of appeals over suits against EPA challenging the *validity* of EPA regulations, and (2) in the district courts over suits seeking to *enforce* EPA regulations. Congress has barred district courts from entertaining attacks on the validity of EPA regulations in enforcement proceedings like this one.

Yet that is precisely what respondent has accomplished here: it sought and obtained invalidation of key aspects of the Silvicultural Rule and Phase I stormwater rule in an enforcement proceeding initiated in district court. And it did so *decades* out of time. Section 509(b)(1) provides in plain terms that challenges to the validity of a regulation must be brought "within 120 days" of the regulation's promulgation. This is not a case in which "grounds arising after the 120-day filing window" restarted the clock. That exception applies only when an event ripens a previously *unripe* claim (a rule with no application here) and has no bearing, in any case, on the status of this suit as an enforcement action brought in district court. In short, the lower courts were without power to entertain respondent's challenge to the Silvicultural Rule and stormwater rule and lacked jurisdiction to invalidate those rules.

Allowing the Ninth Circuit's invalidation of EPA's rules to stand would flout the CWA's judicial review provisions, undercutting Congress's express purpose of ensuring consistent and reliable enforcement of EPA's regulations. This Court should reverse the Ninth Circuit's jurisdictional ruling to restore Congress's orderly allocation of judicial review and citizen suit proceedings.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN SECOND-GUESSING EPA'S LONG-SETTLED INTERPRETATIONS OF THE CWA AND ITS IMPLEMENTING REGULATIONS.

The Ninth Circuit made two errors in holding that channeled forest road runoff is subject to NPDES permitting, each of which independently requires reversal.

First, the court mistakenly held that such runoff is a point source discharge as defined in the Clean Water Act and EPA's Silvicultural Rule. Appropriate deference to EPA's interpretation of the CWA in its Silvicultural Rule compels the opposite result: collected forest road runoff is not a point source, and nonpoint sources never require NPDES permits.

Second, not every point source discharge is subject to NPDES permitting—only certain categories, including those "associated with industrial activities," require a permit. The Ninth Circuit misinterpreted EPA regulations defining point source discharges "associated with industrial activity" when it brought channeled forest road runoff within their reach. EPA has expressly rejected that view. Had the court properly construed the regulations, and proper-

ly deferred to EPA, it could not have held forest road runoff to be associated with industrial activity.

A. EPA's Determination That Channeled Forest Road Runoff Is Nonpoint Source Is Entitled To Deference.

It has been settled for more than 35 years that "[s]ilvicultural point source[s]" do not include "silvicultural activities" such as "surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b)(1). Stormwater runoff from forest roads, "whether or not the rainfall happens to collect before flowing into navigable waters," falls within this nonpoint source category and therefore is not subject to NPDES permitting. 40 Fed. Reg. 56932 (Dec. 5, 1975); see 41 Fed. Reg. 24711 (June 18, 1976) ("runoff from road construction and maintenance for the purposes of forest management" is properly included on "the list of nonpoint sources").

This is a paradigm case warranting *Chevron* deference. The CWA's definition of "point source" is ambiguous and EPA's interpretation is reasonable. The Silvicultural Rule is the product of careful agency consideration, reflects EPA's expert judgment with respect to a complex statute, and has been applied consistently for decades. And Congress implicitly approved the Rule in its 1987 Amendments to the CWA. Proper deference to EPA requires reversal.

1. Congress left a gap for EPA to fill concerning the definition of silvicultural point source discharges.

When Congress leaves "'a gap for an agency to fill,'" the agency has authority "'to elucidate a specific provision of the statute by regulation,'" and "any en-

suing regulation is binding in the courts" unless "manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001). Such gaps may result from statutory ambiguities, which exist "when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:2, at 13 (7th ed. 2007); see also *Chickasaw Nation* v. *United States*, 534 U.S. 84, 90 (2001). To ascertain whether a statute is "ambiguous with respect to [a] specific issue addressed by [a] regulation," courts "must look" to "the particular statutory language at issue," as well as "the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). Courts must defer to an agency determination unless the language, "purpose and structure of the statute clearly reveal a contrary intent on the part of Congress." *Chem. Mfrs. Ass'n* v. *NRDC, Inc.*, 470 U.S. 116, 125 (1985) (deferring to EPA's interpretation of the CWA).

Here, the language and design of the CWA leave room for EPA to determine, in its expert discretion, which categories of silvicultural discharges constitute point source discharges and which do not. The Act reasonably can be read (as EPA *did* read it) to exclude stormwater runoff from forest roads from the definition of "point source," regardless of whether that runoff is channeled.

a. Interpretation begins with "the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The CWA provides that point source discharges "of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). It then subjects that general rule to exception, autho-

rizing EPA to "issue a permit for the discharge of any pollutant" (§ 1342(a)(1)) from "point sources," subject to "[e]ffluent limitations" (§ 1311(e)) set by EPA. The statute defines a "point source" as "any discernible, confined and discrete conveyance," including "any pipe, ditch, channel, [or] conduit." 33 U.S.C. § 1362(14).

Every court to have considered the issue has recognized that Congress expected EPA to exercise judgment in defining point source and nonpoint source pollution. See, *e.g.*, *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d 1181, 1184, 1190 (9th Cir. 2002) (recognizing that EPA "has some power to define point source and nonpoint source pollution," and identifying rain-driven "residue left on roadways" as "[t]he most common example of nonpoint source pollution"); *NRDC* v. *Costle*, 568 F.2d 1369, 1377, 1382 (D.C. Cir. 1977) ("power to define point and nonpoint sources is vested in EPA"); *Nat'l Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982) ("Congress expressly meant EPA to have * * * at least some power to define the specific ter[m] 'point source'"); *NRDC, Inc.* v. *Train*, 396 F. Supp. 1393, 1395, 1401-1402 (D.D.C. 1975) ("Congress intended for [EPA] to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources"). The requirement that point sources are "discernible, confined *and* discrete" conveyances is particularly difficult to apply to stormwater runoff in a rural setting. As the D.C. Circuit observed in *Costle*, in considering "to what extent point sources are involved in agricultural [and] silvicultural" runoff, "[t]he definition of point source," including "the concept of a 'discrete conveyance,' suggests that there is room" for "exclusion by interpretation." 568 F.2d at 1377.

Thus, EPA early on determined that it could properly distinguish between, on the one hand, the four point source activities identified in the Silvicultural Rule that involve "controlled water use by a person" (41 Fed. Reg. 6282), and, on the other, allowing rainwater flowing through the forest to be channeled along the road in a customary way so as not to destroy forest roads. That is sensible in light of the statutory text. Whether a conveyance is discrete—that is, whether it is "separate," "distinct," "unconnected" (WEBSTER'S THIRD NEW INT'L DICTIONARY 647 (1971))—reasonably depends on whether its input is essentially singular, as from a confined construction site or use of the water by a person, or diffuse, as from forest runoff. Here, as EPA observed, the input is natural rainfall exposed to a forest over massive acreage or miles of road. It would be channeled naturally, and is simply being diverted from the path it otherwise would travel. See 41 Fed. Reg. 24710 (silvicultural nonpoint source discharges are "induced by natural processes" and "not traceable to any discrete or identifiable facility").

Other provisions of the CWA enacted in 1972 likewise show that regulators must draw the line between point and nonpoint sources, and that "silvicultural activities" can reasonably be understood to fall on the nonpoint source side of that line. Thus 33 U.S.C. § 1314(f) requires EPA to publish "guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants," along with information on "methods to control pollution resulting from * * * agricultural and silvicultural activities"

such as "runoff" from "forest lands."[1] Similarly, 33 U.S.C. § 1288(b)(2)(F) provides that state planning processes include "identify[ing] * * * agriculturally and silviculturally related nonpoint sources of pollution."

Indeed, the CWA can be read in such a way that forest road runoff is not a kind of pollution even *potentially* subject to permitting. The Act prohibits "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a). Yet forest road runoff is "induced by natural processes" and is "not traceable to any discrete or identifiable facility," even if ultimately gathered and channeled by a drainage system (41 Fed. Reg. 24709, 24710)—it is, in short, not the result of an "application or utilization of water *by any person*." 41 Fed. Reg. 6282 (emphasis added). The CWA also applies by its terms to "owner[s] or operator[s] of * * * point source[s]." 33 U.S.C. § 1311(c), (g)(3). But forest roads routinely "pass through multiple owners and multiple properties," and "ownership of the road does not necessarily correspond to the ownership of the forest land," creating "a highly complex mosaic of overlapping responsibilities." 77 Fed. Reg. 30473, 30475 (May 23, 2012). This makes it often impossible to attribute responsibility for the runoff to any particular "owner or operator."

Congress's 1987 Amendments to the CWA confirm the reasonableness of EPA's approach. Congress

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[1] EPA has pointed out that "section 304(f) is focused primarily on addressing pollution sources outside the scope of the NPDES program." 73 Fed. Reg. 33697, 33702 (June 13, 2008) (quoting H.R. Rep. No. 92-911, at 109 (1972) ("[t]his section" on "*nonpoint sources* is among the most important in the 1972 Amendments") (emphasis added by EPA)).

in 1987 expressly provided that point source discharges "d[o] not include agricultural stormwater discharges." 33 U.S.C. § 1362(14). As reflected in the U.S. Forest Service's placement within the Department of Agriculture, silviculture is a kind of agriculture. See Kevin Belt, *Silvics & Silviculture—The Agriculture of Trees*, http://tinyurl.com/silvics ("Silviculture is the agriculture of trees"); JOHN GIFFORD, PRACTICAL FORESTRY 12 (1902) (agreeing with the "claim that silviculture is a branch of agriculture"). By specifying that "agricultural" stormwater discharges are not point source discharges, Congress confirmed EPA's authority to determine that channeled silvicultural stormwater runoff is not a point source discharge. At a minimum, Congress's "expres[s] exclu[sion]" of agricultural stormwater runoff that "otherwise" might constitute a point source discharge "casts doubt on any claim that Congress specifically intended" runoff from the silvicultural branch of agriculture to be treated as point source. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 711 (2011).

Furthermore, Congress's exclusion of all agricultural stormwater discharges from the definition of point source—as well as its additional exclusion of "return flows from irrigated agriculture"—is on its face flatly inconsistent with the Ninth Circuit's reasoning that *any* ditch is a point source under Section 502(14). Pet. App. 30a-31a. Congress contemplated that some ditches are not.

In short, the CWA cannot be said to "speak with the precision necessary to say definitively whether" channeled forest road runoff is a point source discharge requiring a permit. *Mayo Found.*, 131 S. Ct. at 711. Because it does not "clearly reveal a contrary

intent on the part of Congress," the statutory language gave EPA room to promulgate the Silvicultural Rule. *Chem. Mfrs.*, 470 U.S. at 126.[2]

b. The propriety of EPA's interpretation is confirmed by the design and purpose of the statute. "The meaning—or ambiguity—of certain words or phrases" may "become evident when placed in context" and "with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). Just so here.

NPDES permits are authorized only "upon condition that [a] discharge" meets "all applicable requirements" of the statute (§ 1342(a)(1)), including "effluent limitations" established by EPA (§ 1311(e)). Effluent limitations are performance standards that reflect specified levels of pollutants for particular categories of discharges. EPA has established standards for more than 50 different industrial categories, including metal finishing facilities, steam elec-

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[2] The Ninth Circuit emphasized legislative history in concluding that the CWA unambiguously defines point source discharges to include channeled forest road runoff. Pet. App. 12a-16a. But reliance on "murky, ambiguous, and contradictory" legislative history is a risky undertaking that invites judges to "look[] over [the] crowd and pick[] out [their] friends." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Other parts of the same legislative history suggest that members of Congress well understood that EPA would have discretion to define point source discharges (*e.g.*, 117 Cong. Rec. 38816 (1971) (Sen. Muskie) ("Guidance with respect to the identification of 'point sources' and 'nonpoint sources'" will "be provided in regulations and guidelines of the Administrator")), and that silvicultural runoff was nonpoint in nature (*e.g.*, 133 Cong. Rec. 1591 (1987) (Sen. Simpson) ("non-point source pollution" includes "timber operations" and "other sources of run-off which are not considered point sources")).

tric power plants, and iron and steel manufacturing facilities. 40 C.F.R. Parts 405-471. Establishing and enforcing effluent limitations are the principal objectives of NPDES permitting.

EPA concluded, however, that effluent limitations cannot sensibly be used to manage runoff from forest roads, whether or not channeled through ditches. That is because agriculture and silviculture "present runoff-related problems not susceptible to the conventional NPDES permit program including effluent limitations" (40 Fed. Reg. 56932 (Dec. 5, 1975)), and it is questionable whether it "is practicable, or even feasible, to address stormwater discharges from [forest] roads" under a permitting system at all (77 Fed. Reg. 30474-30475). The reason why is clear: runoff is "caused solely by natural processes," primarily "precipitation events," and is neither "traceable to any discrete or identifiable facility" of the sort Congress had in mind when it adopted the NPDES scheme, nor the result of an "application or utilization of water by any person." 41 Fed. Reg. 6282; see also 41 Fed. Reg. 24710. These features, EPA concluded, mean that runoff "is more effectively controlled by the use of planning and management techniques" than by "numerical effluent limitations in individual permits." 41 Fed. Reg. 6282.

This conclusion is reflected in "the structure of the [CWA]." 41 Fed. Reg. 6282. "On the basis of th[e] conceptual differentiation" the Act makes between "the pollution control mechanisms available for point and nonpoint sources," EPA in the Silvicultural Rule rejected a reading of the point source definition that would include every conveyance. *Ibid.* It instead considered, among other things, whether effluent limitations were a sensible means to address a particular

type of runoff. EPA thought it "evident" that "ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject to the § 402 permit program." *Ibid.* See 40 Fed. Reg. 56932 ("most rainfall runoff is more properly regulated under section 208 of the [CWA], whether or not the rainfall happens to collect before flowing into navigable waters"); 41 Fed. Reg. 24711 ("Insofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should be considered nonpoint in nature").

c. Another important feature of the CWA is Congress's intent to "preserve" and "protect the primary responsibilities and rights of States" to address water pollution and "plan the development and use" of "land and water resources." 33 U.S.C. § 1251(b). Designation of a type of discharge as a point source directly impacts this legislative goal: point source discharges fall under federal permitting programs, while nonpoint sources are addressed primarily by the States. It is accordingly appropriate that EPA be wary of attaching the point source label and thereby moving "primary responsibilit[y]" for controlling a source to the federal government.

The Ninth Circuit's designation of forest road runoff as a point source is particularly perverse in its federalism implications, for two reasons.

First, forest roads are often state- or county-owned, and their regulation "is a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 737-738 (2006) (plurality). As the certiorari-stage brief of 26 States attests, EPA correctly discerned that control of runoff from these roads properly belongs to the States. Cf. *id.* at 777 (Kennedy, J., concurring).

Second, the basis for the Ninth Circuit's designation of forest road runoff as a point source—and thus the basis for taking it away from the States—is the ditch-and-culvert system. But that system is mandated or recommended by States as a "best management practice" to address otherwise non-channeled runoff and prevent roads from washing out (which would cause more sediment). These state BMPs accord with EPA and Forest Service recommendations to "instal[l] drainage features as part of the construction process." Solari, *supra*, at 17, 23. It would be bizarre if—as the Ninth Circuit effectively held—States must regulate non-channeled runoff as nonpoint source, but when they do so according to standard-practice BMPs, the runoff is thereby transformed into a point source subject to federal permitting. As the State defendants explained below, this circular reasoning cannot be correct. "Congress did not intend to require NPDES permits for silvicultural runoff simply because" state BMPs "happen to involve ditches and culverts." Br. of State Defs., No. 07-35266, at 19 (9th Cir. filed Nov. 5, 2007).

At a minimum, the Act's goal to preserve States' authority, which is undermined by an expansive interpretation of the point source definition in which federal regulation is triggered by commonplace state BMPs, confirms the ambiguity that gives EPA leeway in drawing the point-nonpoint source distinction.

Against this textual and structural backdrop, the term "point source" is at least ambiguous in the silvicultural context—the language, "purpose and structure of the statute" do not "clearly reveal" that Congress's "intent" is "contrary" to the Silvicultural Rule. *Chem. Mfrs.*, 470 U.S. at 126. The CWA thus "neces-

sarily requires the formulation of policy and the making of rules to fill [the] gap" with respect to silvicultural discharges—a task Congress left to EPA. *Mayo Found.*, 131 S. Ct. at 713.

2. The Silvicultural Rule is a reasonable interpretation of the CWA to which deference is warranted.

To sustain EPA's interpretation of the CWA, this Court "need not find that it is the only permissible construction," but "only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chem. Mfrs.*, 470 U.S. at 125. The Silvicultural Rule easily meets this standard.

a. As we have explained, the CWA expressly defines "point source" discharges to exclude "agricultural stormwater discharges." 33 U.S.C. § 1362(14). Congress further recognized that "agricultural and silvicultural activities, including runoff from fields and crop and forest lands," are generally "nonpoint sources of pollutants." *Id.* § 1314(f)(1) & (2)(A). EPA's interpretation of this language as permitting the designation of channeled stormwater runoff from forest roads as nonpoint source is, at minimum, "rational." *Chem. Mfrs.*, 470 U.S. at 125. Indeed, it is the most sensible understanding of the statute.

EPA concluded that "most silvicultural activities" are not "amenable to effective regulatory control" by "numerical effluent limitations" because stormwater runoff—channeled or not—is "initiated or caused solely by natural processes, including precipitation," and is "not traceable to any discrete or identifiable facility" likely to introduce specific contaminants. 41 Fed. Reg. 6282. Such diffuse, natural, and irrepress-

ible sources of discharge are "better controlled through the utilization of best management practices," and not effluent limitations unsuitable to the task. 41 Fed. Reg. 24710; see also 55 Fed. Reg. 20521, 20522. That expert determination "is reasonable in light of the statute's text and the overall statutory scheme" and therefore is "entitled to deference under *Chevron*." *Nat'l Ass'n of Homebuilders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

b. *Chevron* provides a particularly "appropriate legal lens through which to view the legality of the Agency interpretation" where that "interpretation is one of long standing," the regulation implicates the "expertise of the Agency," there is particular "complexity [to the Agency's] administration" of the statute, and the regulation is the result of "careful consideration" over "a long period of time." *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002). That describes this case exactly.

The Silvicultural Rule reflects EPA's considered, long-held view. It has been in place since 1976, applied consistently ever since, and reaffirmed on numerous occasions. See, *e.g.*, 60 Fed. Reg. 50835 (Sept. 29, 1995) (reaffirming the Silvicultural Rule); 55 Fed. Reg. 20522 (same). And it was the result of notice-and-comment rulemaking during which EPA "carefully examined the relationship between the NPDES permit program" and "water pollution from silvicultural activities" and "carefully considered" "more than ninety written statements" responding to its proposal. 41 Fed. Reg. 6282; 41 Fed. Reg. 24709-24710. Based on this careful analysis, EPA "determined that most water pollution related to silvicultural activities is nonpoint in nature," whether or not

channeled in "ditches, pipes, and drains." 41 Fed. Reg. 6282.

The rule also falls squarely within EPA's expertise. EPA has been assigned the daunting task of administering highly complex environmental laws. In doing so, EPA has developed expert knowledge about pollution, the environment, and the interaction between the two, as well as unique experience with the benefits and disadvantages of specific kinds of legal rules to address particular kinds of environmental issues. *E.g.*, *Shanty Town Assocs. Ltd. P'ship* v. *EPA*, 843 F.2d 782, 790 (4th Cir. 1988) ("Congress charged EPA" with "developing special expertise in the control of water pollution, and with using that expertise to carry out the [CWA]'s goal of improving water quality"). The Silvicultural Rule implicates both forms of expertise, which are not shared by generalist federal judges.

The treatment of forest road runoff is precisely the kind of technical issue that demands deference to expert agency judgment. As this Court has said before, the CWA is a "very complex statute," and "the agency charged with administering" it is "entitled to considerable deference." *Chem. Mfrs.*, 470 U.S. at 125; see *Shanty Town*, 843 F.2d at 790 ("EPA is entitled to special deference when it applies the general provisions of the [CWA] to the complexities of particular water pollution control problems"). There is no reason to decline deference here.

c. This Court has observed that deference "to the longstanding interpretation placed on a statute by an agency charged with its administration" is even more appropriate "where Congress has re-enacted the statute without pertinent change." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). "[C]ongres-

sional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Id.* at 275.

In 1987 Congress substantially modified the CWA's treatment of stormwater. *Supra*, pp. 5-6. Yet in the course of this far-reaching revision Congress did not disapprove EPA's prior treatment of silvicultural stormwater. Indeed, it added a provision to Section 502(14) expressly excluding agricultural runoff from point source regulation—an addition that is consistent with and arguably authorizes the Silvicultural Rule. Congress's actions in 1987 are "persuasive evidence" that EPA's long-standing exclusion of channeled forest road runoff "is the [interpretation] intended by Congress" all along. *Bell Aerospace*, 416 U.S. at 275.

That is especially so because the 1987 Amendments left EPA with wide latitude to determine when and under what circumstances point source stormwater runoff must be permitted. As explained more fully below, the regulations EPA promulgated pursuant to the 1987 Amendments independently require reversal here because they exclude channeled forest road runoff from permitting, even if it were a point source. But they also suggest that lawmakers—in comprehensively revisiting the regulation of stormwater and leaving EPA with considerable discretion in that area—were well aware of the Silvicultural Rule and intended to approve it as a legitimate interpretation of the CWA.[3]

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[3] The Ninth Circuit's suggestion that "there is no indication that Congress was aware of the Silvicultural Rule when it adopted the 1987 amendments" is bewildering. Pet. App. 34a. It blinks reality to think that lawmakers, in enacting a law "to

3. *EPA's interpretation of the Silvicultural Rule also is entitled to deference.*

In addition to ruling that the Silvicultural Rule as understood by EPA is "invalid" under the CWA, the Ninth Circuit offered another basis for holding the rule inapplicable: that the words "natural runoff" in the rule mean runoff that is *not* "channeled and controlled." Pet. App. 32a. But EPA has consistently interpreted the rule to mean the opposite, and its interpretation is entitled to deference.

a. The Silvicultural Rule provides that "natural runoff" from "surface drainage, or road construction and maintenance" related to "silvicultural activities" is "non-point source." 40 C.F.R. § 122.27(b). As EPA explained to the district court, "[t]hroughout the history of its silvicultural point source rule," EPA has used "natural runoff," runoff "from precipitation events," and runoff "induced by natural processes" "as interchangeable terms" that apply without regard for whether the runoff is channeled. Pet. App. 113a-114a.

That reading is rational. The words "natural runoff" readily can be understood to encompass *all* pre-

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deal specifically with stormwater discharges" (*id.* 35a), were not aware of EPA's approach to silvicultural stormwater discharges. In fact, there *is* evidence that Congress considered the Silvicultural Rule. In an obvious reference to the Rule, Senator Durenberger observed that EPA, rather than requiring permits for stormwater runoff from forest roads, had identified "[b]est management practices" for "reducing runoff" from "silviculture areas including careful road placement, culverting, [and] grassing of abandoned roads." 132 Cong. Rec. 32380, 32381, 32397 (Oct. 16, 1986). The same observation is reflected in the Senate Report accompanying S. 1128, an early version of the 1987 Amendments. S. Rep. 99-50, at 35-36 (May 14, 1985).

cipitation runoff, regardless whether it is collected in ditches. The phrase stands in obvious contrast to the non-natural activities that EPA designated as silvicultural point sources: "rock crushing, gravel washing," holding wood in water bodies, or applying water intentionally to stored logs. 40 C.F.R. § 122.27(b).[4]

By contrast, the Ninth Circuit's reading is irrational. It renders meaningless the rule's reference to runoff from "road construction and maintenance." As a practical matter, forest roads cannot be built or maintained without stormwater drainage systems: without them, the roads would wash out. Indeed, state BMPs typically *require* them. Because stormwater drainage systems are an integral element of forest roads themselves, the rule's reference to "natural runoff" must be read to include *channeled* runoff, or else the words "road construction and main-

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[4] EPA has long made this distinction. For example, in *Newton County Wildlife Association* v. *Rogers*, 141 F.3d 803 (8th Cir. 1998), the court of appeals rejected an environmental group's claim that the U.S. Forest Service was required to obtain Section 402 permits for "discharges of pollutants that will accompany logging and road construction" (*id.* at 810) because "culverts" and "road-side drainage ditches" were "point sources subject to NPDES." Reply Br. of Appellants, No. 97-1852 (8th Cir. filed Oct. 14, 1997); see Pet. 25-26. The United States told the Eighth Circuit that it is "crystal clear" from the "plain language" of the regulation and "the preamble to the final rule" that "'*only* discharges from the four activities related to silvicultural enterprises'" identified in the rule—an "exclusive list"—"'are considered point sources'"; that "EPA considers all other silvicultural activities to be nonpoint sources"; and that "EPA has consistently adhered to that interpretation." Br. of the Federal Appellees, No. 97-1852 (8th Cir. filed Sept. 8, 1997) (emphasis in original).

tenance" would be rendered totally ineffective, as the United States has explained. See Pet. App. 114a.

b. EPA's interpretation accordingly is entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). An agency's interpretation of its own regulation is "controlling" unless it is "plainly erroneous or inconsistent with the regulation." *Ibid.*; see *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). This Court has applied this settled doctrine in several recent, unanimous opinions. See *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011); *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871 (2011); *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158 (2007).

EPA's interpretation of the Silvicultural Rule is not "plainly erroneous or inconsistent with the regulation." Even assuming there were "other ways to interpret the regulatio[n]," EPA's reading is a permissible one, representing its "fair and considered judgment" on the meaning of "natural runoff." *Pliva, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2575 (2011).

Although *Auer* deference "does not apply in all cases" (*Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)), it does apply here. "[B]road deference" is warranted because "the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). And there is no cause to question whether EPA's views reflect its "fair and considered judgment." *Long Island Care*, 551 U.S. at 171. EPA's views have been repeatedly

and consistently expressed over several decades. Cf. *Kennedy*, 129 S. Ct. at 872 n.7 (deferring to agency interpretation of its regulation even when "the Government's position" had "fluctuated").

That EPA most recently presented its views in a legal brief does not affect the deference due. In *Auer*, this Court deferred to agency views presented in a brief after observing that those views were "in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," 519 U.S. at 462. It did so for the same reasons in *Chase Bank* and *Talk America* and should do the same here.

None of the other factors that might weigh against *Auer* deference is present here. EPA has not "promulgate[d] vague and open-ended regulations" that fail to give fair warning to regulated entities or invite "later interpret[ations] as [EPA] see[s] fit." *Christopher*, 132 S. Ct. at 2168; see also John F. Manning, *Constitutional Structure & Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 655-668 (1996). On the contrary, EPA has explained and applied the Silvicultural Rule consistently since adopting it. Thus what threatens to upset settled expectations in *this* case is not an agency's shifting interpretation of ambiguous regulations, but the Ninth Circuit's upending of EPA's long-standing approach.

In sum, the Court should defer to the Silvicultural Rule as a rational interpretation of the CWA, and to EPA's reading of the rule as a rational interpretation of the regulation. When such deference is afforded, the Silvicultural Rule marks the beginning and the end of this case. Because stormwater runoff from forest roads is not "related to rock crushing,

gravel washing, log sorting, or log storage facilities" but instead to the "non-point source silvicultural activities" of "surface drainage" and "road construction and maintenance from which there is natural runoff" (40 C.F.R. § 122.27(b)(1)), petitioners here need not obtain NPDES permits. And because EPA's stormwater regulations do not apply to nonpoint-source discharges, the Court need proceed no further in its analysis; the judgment below should be reversed on this basis alone.

B. The Ninth Circuit Erred In Holding That Channeled Silvicultural Runoff Is "Associated With Industrial Activities" Within The Meaning Of EPA's Stormwater Regulation.

The Ninth Circuit independently erred by misreading EPA's regulations implementing the 1987 Amendments to the CWA and failing to defer to EPA's interpretation of those regulations.

1. Discharges "associated with industrial activities" do not include runoff from forest roads.

a. In 1987, Congress established a two-phase approach to "discharges composed entirely of stormwater." CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1). In Phase I, Congress required EPA to issue NPDES permits for five categories of stormwater point source discharges, including (as relevant here) those "associated with industrial activity"—a phrase that Congress did not define. *Id.* § 1342(p)(3)(A).

In Phase II, Congress tasked EPA with studying stormwater discharges not covered by Phase I and, "based on the results of the studies," with regulating such discharges "as appropriate," including by set-

ting "performance standards, guidelines, guidance, and management practices and treatment requirements." 33 U.S.C. § 1342(p)(5)-(6); see Pet. App. 37a. Discharges not designated in Phases I or II "shall not require a permit." *Id.* § 1342(p)(1); see *id.* § 1342-(p)(2), (5)-(6).

EPA undertook its Phase I mandate to regulate stormwater "associated with industrial activity" in 1990. 55 Fed. Reg. 47990 (Nov. 16, 1990); 40 C.F.R. § 122.26. Two elements of EPA's Phase I regulation are determinative here. First, the regulation provides that a "discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is *directly related to manufacturing, processing or raw materials storage areas at an industrial plant.*" 40 C.F.R. § 122.26(b)(14) (emphasis added). Second, the regulation expressly provides that stormwater associated with industrial activity "does not include discharges from facilities or activities excluded from the NPDES program under [the Silvicultural Rule]." *Id.* § 122.26(b)(14). The Silvicultural Rule in turn defines "*harvesting operations*"—*i.e.*, logging—as "non-point source silvicultural activities" outside the NPDES program. *Id.* § 122.27(b) (emphasis added); see also 55 Fed. Reg. 48011 ("the definition of 'storm water discharge associated with industrial activity' does not include sources" which "are excluded under [the Silvicultural Rule]").

The meaning of this language is clear. Stormwater runoff from forest roads is *not* directly related to manufacturing, processing, or raw materials storage at an industrial plant. And logging is explicitly deemed not to be "industrial activity." Accordingly, EPA's stormwater regulation cannot plausibly be

read to define stormwater runoff from forest roads as associated with an "industrial activity" subject to Phase I permitting.

b. The Ninth Circuit nevertheless concluded that forest road runoff *is* a stormwater discharge "associated with industrial activity." Pet. App. 39a-42a. The court thought logging "industrial" because "[f]acilities classified as Standard Industrial Classifications 24" (which includes logging) are among facilities "considered to be engaging in 'industrial activity.'" 40 C.F.R. § 122.26(b)(14) & (b)(14)(ii); see SIC 24, 2JA 65-71. The court believed forest roads to be "associated" with this industrial activity because they are "immediate access roads," the "primary use" of which, the court speculated, is logging. *Id.* § 122.26(b)(14); Pet. App. 40a.

This convoluted reasoning—the product of a myopic focus on isolated snippets of regulatory language—is wrong in every respect. First, the regulation does not encompass *all* "industrial activity" (Pet. App. 39a), but only activities of "*facilities*" that are "considered to be engaging in 'industrial activity,'" including "*facilities*" classified as SIC 24. 40 C.F.R. § 122.26(b)(14), (b)(14)(ii) (emphasis added); see 2JA 98-103. Logging itself is not the activity of a *facility*, which is something "that is built, constructed, installed, or established to perform some particular function." WEBSTER'S THIRD NEW INT'L DICTIONARY 812-813 (1971). According to EPA, logging-related facilities covered by the regulation include only those "[e]stablishments" engaged in "operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials." 55 Fed. Reg. 48008. They do not include timber harvesting sites, which are not "built," "constructed," or "installed."

Second, the Ninth Circuit's reading cannot be squared with the regulation's clear provision that stormwater associated with industrial activity "does not include discharges from facilities or activities [covered by the Silvicultural Rule]" (40 C.F.R. § 122.26(b)(14))—including "harvesting operations" and "surface drainage, or road construction and maintenance from which there is natural runoff." *Id.*, § 122.27(b)(1). This carve out is particularly striking because it was included in paragraph (b)(14) in direct response to commentary that the Phase I regulations should not apply to "transitory [logging harvest] operation[s]." 55 Fed. Reg. 48011. EPA "agree[d]" with this commentary and, to "clarif[y]" that agreement, explained that "[t]he definition of discharge associated with industrial activity does not include activities" covered by the Silvicultural Rule. *Ibid.* Because "harvesting operations" are not an industrial activity, forest roads cannot be "immediate access roads" for an industrial activity. And the rule's explicit exclusion of drainage from roads confirms that Phase I permitting is inapplicable.[5]

Finally, forest roads are not associated with industrial activity because they are not "immediate access roads" within the meaning of the regulation. EPA explained that this provision covers only

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[5] It would make no difference to this analysis if the Silvicultural Rule were invalid with respect to forest roads. What counts for purposes of interpreting EPA's Phase I regulations is what EPA understood the Silvicultural Rule to mean in 1990, when it specified that stormwater associated with industrial activity "does not include discharges" covered by that Rule. And in 1990 EPA reiterated its "longstanding view" that runoff from forest roads, "although sometimes channeled," is "non-point source in nature." 55 Fed. Reg. 20521, 20522 (May 17, 1990).

"[a]ccess roads" that are "within" or "at facilities." 55 Fed. Reg. 48009. General forest roads are not "within" or "at" a logging facility. They are used for "a wide range of activities, including timber operations, recreation, fire protection, [and] transportation," "often serv[ing] multiple purposes by multiple users at the same time." 77 Fed. Reg. 30475. And many are "public access roads such as state, county, or federal roads * * * which happen to be used by the facility." 55 Fed. Reg. 48009. That logging may have been the impetus for the initial construction of some roads (Pet. App. 40a) is irrelevant.

The Ninth Circuit did not try to harmonize its reading of the regulation with any of the language discussed above. A plain reading of the words of the Phase I regulation, including its reference to the Silvicultural Rule, shows that discharges "associated with industrial activity" do not include channeled forest road runoff. EPA "sa[id] * * * what it mean[t] and mean[t] * * * what it sa[id]." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

2. EPA's interpretation of its own regulation is entitled to substantial deference.

a. The Court need not take our word for it. EPA itself has repeatedly affirmed that, in its view, channeled stormwater runoff from forest roads is *not* a discharge "associated with industrial activity" subject to the CWA's Phase I permit requirement.

In 1995, for example, when it promulgated the first "multi-sector general permit" for certain Phase I discharges of stormwater runoff, EPA detailed which "storm water discharges associated with industrial activity from timber products facilities" it believed to be covered by the regulation. 60 Fed. Reg. 50834,

50835 (Sept. 29, 1995). It concluded that "[d]ischarges from nonpoint source silvicultural activities, including harvesting operations" are "not required to be covered" by a Phase I permit and that "harvesting activities include * * * initial transport of forest products from an active harvest site." *Ibid.*

EPA has consistently expressed the same view in briefs. In a 2003 brief urging dismissal of a suit alleging that runoff from forest roads collected in "ditches, channels, pipes, [and] culverts" requires a permit, EPA told the court that "discharge associated with an industrial activity" "'does not include discharges from facilities or activities excluded from the NPDES program under this part 122'"; that Part 122.27 "excluded runoff from certain silvicultural activities from the NPDES program"; and that, "[c]onsequently, EPA did not incorporate silvicultural storm water discharges into the definition of 'storm water discharges associated with industrial activities.'" Pet. App. 86a-87a. Accordingly, "storm water discharges from forest roads are not currently subject to NPDES permit requirements." Pet. App. 91a.

In its brief before the Ninth Circuit here, EPA reaffirmed its interpretation of the "plain language of the rule" as expressing a "clear intent" to "exclud[e] runoff from forest roads from" Phase I permitting. 1JA 42. The Solicitor General's invitation brief reflects the same view, explaining that timber harvesting does not fall within the category of "traditional industrial activities" covered by the regulation, and that forest roads are not "immediate access roads" to industrial facilities in any event. U.S. Cert. Br. 13.

b. We believe the language of EPA's stormwater regulation is clear, but even if it were not, this Court

should defer under *Auer* to EPA's reasonable interpretation of its regulation. The Phase I regulation concerns a complex, highly technical regulatory program requiring "significant expertise" and "the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ.*, 512 U.S. at 512. The views set forth in EPA's and the Solicitor General's briefs follow from, and are consistent with, those that EPA had repeatedly expressed over the course of decades in rulemaking proceedings.

The Ninth Circuit failed to give EPA's interpretation of its regulation proper deference. Although recognizing early in its opinion that courts must "defer to an agency's interpretation of its own regulations" (Pet. App. 8a (quoting *Auer*)), the court made no effort to evaluate EPA's interpretation within the *Auer* framework. Instead, it proceeded straight to second-guessing EPA's expert judgment concerning its own regulation. That is not the law: Congress delegated rulemaking authority under Phase I of the CWA's stormwater permitting program to EPA, not the Ninth Circuit. The Court should defer to EPA's interpretation of Section 122.26(b)(14) and, on this independent basis, should reverse.

C. As EPA Determined, Forest Road Runoff Is Better Addressed With Best Management Practices Than NPDES Permits.

The reasonableness of EPA's interpretation of the CWA and its own regulations is apparent when viewed in light of the practical consequences of the Ninth Circuit's ruling. Requiring permits for channeled forest road runoff would impose staggering costs on regulators and regulated alike, and inject massive confusion into forest road management, without achieving gains in environmental protection.

An interpretation that "undermine[s]" the "regulatory scheme of [an] Act" and frustrates "administrative action imperative for the achievement of an agency's ultimate purposes" is strongly disfavored. *Weinberger* v. *Bentex Pharm., Inc.*, 412 U.S. 645, 653 (1973).

1. Requiring permits for every discharge of channeled forest road runoff into "the waters of the United States"—a concept of "notoriously unclear" scope, *Sackett* v. *EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)—would be immensely costly and burdensome. Over 750 million acres of forests cover one-third of the continental United States. 77 Fed. Reg. 30475-30476. The U.S. Forest Service estimated that the Ninth Circuit's ruling would require it alone to obtain up to 400,000 permits for its 378,000 miles of forest roads—a process that it estimates would take more than 10 years. U.S. Forest Service, *Implications of Decision in* NEDC v. Brown *to Silvicultural Activities on National Forest System Land*, Doc. 1570-1, at 3 (Sept. 17, 2010). For their part, Oregon counties estimated that it would cost them $56 million to obtain permits for the 20,000 cross culverts along their 4800 miles of forest roads. Am. Br. Nat'l Ass'n of Counties 15-18. Extrapolating those figures across all forests leaves no doubt of the enormity of the burden that permitting would impose on regulators who must process and enforce permits and forest road owners and operators who must obtain, maintain, and comply with them.

An individual NPDES permit involves a labyrinthine application process with public hearings and comments, and imposes requirements of water sampling, effluent limitations, technological standards, monitoring, and treatment of pollutants. EPA, *NPDES Permit Writers' Manual*, www.epa.gov/npdes

/pubs/pwm_2010.pdf. This Court has observed that the "average applicant" for individual dredged-and-fill permits spends "788 days and $271,596 in completing the process." *Rapanos*, 547 U.S. at 721. There is no reason to believe that the costs of obtaining individual Section 402 permits are lower. And opportunities abound for litigation over the propriety of a permit and whether the permittee is in compliance. See 40 C.F.R. § 124.19 (administrative appeal of decision to issue NPDES permit); 33 U.S.C. § 1369(b)(1)(F) (judicial review of same); *id.* § 1365 (citizen suits to enforce permits).

EPA already faces a backlog of permits, which must be renewed every five years. 33 U.S.C. § 1342(b)(1)(B). Recently, only 80% of major and 84% of minor facilities held current permits, because of delays in processing. See http://tiny.cc/EPA2. Adding a new permit requirement for millions of ditches and culverts on forest roads would overwhelm the NPDES program at a time of tight constraints on agency spending. As EPA stated in 1975, and is no less true now, "it would be administratively difficult if not impossible, given Federal and State resource levels, to issue individual permits" for every ditch and culvert. 40 Fed. Reg. 56932.

Heavy penalties for failing to obtain or comply with NPDES permits exacerbate the burden of the Ninth Circuit's decision. Violations of the CWA carry fines of up to $100,000 *per day* and six years' imprisonment. 33 U.S.C. § 1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). And the citizen suit mechanism ensures endless lawsuits seeking penalties of up to $37,500 per violation per day. *Id.* §§ 1319(d), 1365(a). Environmental groups have used citizen suits to ex-

tract significant penalties. For example, New York City was penalized $5.7 million for bringing drinking water to its residents through a creek without a Section 402 permit. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), aff'd in relevant part, 451 F.3d 77 (2d Cir. 2006).

2. The Ninth Circuit conjectured that "general permits" may be available. Pet. App. 43a. But general permits have their own problems. EPA's Multi-Sector General Permit (MSGP) for discharges associated with industrial activity (http://tiny.cc/EPA3) was not designed to address millions of discharges of channeled forest road runoff—for the obvious reason that EPA considers that such runoff is *not* associated with industrial activity. The MSGP requires, for example, that permittees map all "impervious surfaces," "ditches, pipes, and swales," and "inlets and outfalls." MSGP § 5.1.2. That would be a daunting task —far more so for a remote ribbon of forest road than a confined industrial site. And even if owners and operators of forest roads could comply, the costs of doing so would be astronomical and out of all proportion to any benefit given the effectiveness of BMPs.

The MSGP also requires frequent inspections of every discharge and annual inspection "when a stormwater discharge is occurring." MSGP § 4.1.1. Permittees must "collect a stormwater sample from each outfall" "within the first 30 minutes" of a discharge or "as soon as practicable" thereafter. *Id.* §§ 4.2.1, 4.2.3. These requirements, tailored for industrial sites, are unworkable for forest roads. Noncompliance violates the CWA. *Id.* §§ 1.2, 3.1.

Enormous costs and uncertainties would remain even if general permits were revamped to cover for-

est road runoff. General permits impose effluent limitations, technological standards, costly treatment, monitoring, and sampling. See EPA Office of Water, *General Permit Program Guidance* 4 (1988). Yet the basis of EPA's Silvicultural Rule is that such requirements are inappropriate for forest road runoff, channeled or not. The sheer number and variety of discharges over a linear road that may stretch many miles, over varied topography, with a multiplicity of ownership and use, and only intermittent logging use, make the most basic requirements of any NPDES general permit inapt.

General permits also are frequent targets of challenge: the propriety of virtually every new general permit is litigated. See, *e.g.*, *Waterkeeper Alliance, Inc.* v. *EPA*, 399 F.3d 486, 498-506 (2d Cir. 2005) (sustaining challenges to general permit for concentrated animal feeding operations); Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 461 & n.254 (2007). Environmental groups appear skeptical of the legality of the general permit program in general, making challenge likely. See *id.* at 412 ("The EPA general permit program is now essentially incoherent, and existing federal and state issued general permits violate many fundamental requirements" of the CWA; "In a series of recent cases, fundamental aspects of the general permit program have been called into question").

Litigation over compliance with any general permit that survives challenge is also common. See, *e.g.*, *WaterKeepers N. Cal.* v. *AG Indus. Mfg., Inc.*, 375 F.3d 913 (9th Cir. 2004); *S.F. BayKeeper, Inc.* v. *Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002); *NRDC* v. *Sw. Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000); *Eco-*

logical Rights Found. v. *Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000). The damages sought in these citizen suits have been astronomical. See, *e.g.*, *Humane Soc. of United States* v. *HVFG, LLC*, 2010 WL 3322512, at *2 (S.D.N.Y. Aug. 19, 2010) (seeking "between $550,000 to over $600 million in civil penalties, depending on how they were calculated"); *WaterKeepers N. Cal.* v. *AG Indus. Mfg., Inc.*, 2005 WL 2001037, at *6 (E.D. Cal. Aug. 19, 2005) (seeking $5 million penalty against company worth $907,000).

3. The Ninth Circuit's decision overturns decades of practice in which state BMPs have governed forest roads—allowing the States to address "the numerous geographical, meteorological and topographical variations incidental to forest management." 41 Fed. Reg. 24710. Amici States explained in their brief urging review (at 1, 12, 15) that they have established "the most comprehensive program of BMPs of any land use activity in the nation"; have "expended thousands of hours and millions of dollars developing and implementing their respective BMP programs" created by "certified silviculturalists"; have "followed Congressional and EPA's directives"; and have "worked to ensure" that owners and operators of forest roads implement BMPs "to protect water quality and wildlife." Florida, for example, has published a 116-page manual of forestry BMPs. See http://tiny.cc/Flaman. Minnesota offers hundreds of pages of BMPs, including 49 pages devoted specifically to forest roads. See http://tinyurl.com/Minnman1.

The Ninth Circuit's ruling would "jettiso[n]" these established programs. Am. Br. of Arkansas 15. In their place would be "yet another unfunded mandate" and a "blizzard" of permit applications that would create a "tumult" "far outstripping" States' re-

sources. *Id.* at 15-16. Yet, as EPA concluded 36 years ago, stormwater runoff from forest roads is best addressed through BMPs, not permits. *E.g.*, 41 Fed. Reg. 24710 ("numerous forest practices acts, State environmental programs, and local ordinances are excellent sources of effective regulation," which EPA "does not intend to disrupt or supplant").

"Forestry BMPs have been highly successful in controlling non-point pollution from forest operations and roads for decades." Am. Br. of Arkansas 16. BMPs can reduce around 90% of water quality impacts. George Ice, *History of Innovative Best Management Practice Development and Its Role in Addressing Water Quality Limited Waterbodies*, 130 J. ENVTL. ENG'G 684, 688 (2004); 77 Fed. Reg. 30474 (with "appropriate" BMPs, "receiving waters can be protected and impacts can be minimized"). BMP implementation rates are "generally high and increasing." George Ice, *et al.*, *Trends for Forestry Best Management Practices Implementation*, J. FORESTRY, Sept. 2010, at 267, 267-271. And BMPs can quickly reflect scientific advances, with "[n]ew BMPs [being] considered as new issues arise." *Id.* at 268-269.

In response to the Ninth Circuit's decision, EPA reiterated that "one-size-fits-all approaches may not be appropriate for addressing the multiplicity of issues and situations within and across states." 77 Fed. Reg. 30477. It was not the Ninth Circuit's place to jettison State programs in disregard of EPA's longstanding view that BMPs more effectively address forest road runoff than would NPDES permits.

4. The "highly complex mosaic of overlapping responsibilities" for forest roads, EPA has explained, would make application of the NPDES program cumbersome and confusing. 77 Fed. Reg. 30475. For-

est roads support multiple "recreational, administrative, fire protection, and mineral and silvicultural activities" and "often serve multiple purposes by multiple users at the same time." *Ibid.* A single forest road "may pass through multiple owners and multiple properties," and "ownership of the road does not necessarily correspond to the ownership of the forest land." *Ibid.* A road may be used for timber "harvesting once every 20 years or so." *Ibid.* Ranching families and businesses use the same roads to access their grazing leases. See Am. Br. American Forest Res. Council 14. See also, *e.g.*, 43 C.F.R. § 2812.0-6 (BLM land's "intermingled character" presents "problems of management," particularly "with respect to timber roads"); Am. Br. Nat'l Ass'n of Counties 19 (NPDES permitting does not fit the "checkerboard of intermingled private and public" forestland).

The Ninth Circuit's decision, in short, would wreak havoc with all who rely on forest roads. And much of that unjustifiable burden would fall on the forestry industry, which employs more than 1 million people, indirectly supports 2.9 million jobs, creates $87 billion in wages, and sustains industries with annual sales of nearly $263 billion. See FOREST2MARKET, INC., THE ECONOMIC IMPACT OF PRIVATELY-OWNED FORESTS 7-9 (2009).

II. THE COURTS LACK SUBJECT MATTER JURISDICTION OVER THIS SUIT.

A. Courts Have No Authority To Invalidate The Silvicultural Rule Unless CWA Jurisdictional Requirements Are Satisfied.

The Court alternatively should vacate and remand because the courts lack jurisdiction over this long-belated challenge to the Silvicultural Rule. The

Administrative Procedure Act provides that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. § 703. The CWA requires challenges to specified EPA actions—including promulgating any "effluent" or "other limitation under section 1311," "issuing or denying any permit under section 1342," or promulgating regulations governing permit issuance—to be filed in a court of appeals "within 120 days" unless the grounds for the challenge arose later. CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1).[6] The CWA elsewhere provides that "district courts shall have jurisdiction" to "enforce" EPA's regulations. CWA § 505, 33 U.S.C. § 1365.

Thus, the CWA provides for (1) judicial review actions in courts of appeals under Section 509(b)(1), brought against EPA as defendant, in which parties may seek to *invalidate* EPA regulations, and (2) citizen suits in the district courts under Section 505, in which parties may seek to *enforce* EPA regulations. And regulations "with respect to which review could have been obtained under [Section 509(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2).

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[6] *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977), rejected the contention that the courts of appeals' exclusive jurisdiction applies only to individual permit decisions, explaining that it would be "truly perverse" if "courts of appeals would review numerous individual actions issuing or denying permits pursuant to § 402 but would have no power of direct review of the basic regulations governing those individual actions."

These are jurisdictional requirements, not "claim-processing rule[s]." *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011). Congress barred district courts from invalidating EPA regulations, specifying that they may not be collaterally attacked in enforcement proceedings. And it barred rule challenges brought more than 120 days after a rule's promulgation. As the D.C. Circuit held with regard to the 60-day time limit in the Clean Air Act, 42 U.S.C. § 7607(b), it "is jurisdictional in nature." *Med. Waste Inst.* v. *EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011). Thus when "petitioners have failed to comply" with the deadline, courts "are powerless to address their claim." *Ibid.*

B. The Ninth Circuit Erred In Undertaking Judicial Review Of EPA's Rules.

NEDC's citizen "enforcement" suit, filed in district court in 2006, sought to invalidate EPA's Silvicultural Rule, last modified in 1980, and EPA's 1990 stormwater regulation that incorporated the Silvicultural Rule. The Silvicultural Rule deems collected runoff from forest roads to be nonpoint source and thus outside NPDES requirements; but respondent contended "that the discharges at issue [are] point source stormwater discharges" that require a permit. Pet. App. 57a; see Complaint ¶¶ 4, 67, 76, 2JA 3, 18, 20; NEDC Reply Br. 2-3, 15-21 (9th Cir. filed Dec. 17, 2007)); NEDC Opening Br. 52-53 (9th Cir. filed Sept. 17, 2007); NEDC Br. in Opp. 5-7. This suit therefore presents a challenge to the validity of EPA regulations. Under the plain terms of Section 509, it was filed too late, in the wrong court, and against the wrong defendants.

Respondent nevertheless obtained its desired invalidation, at least implicitly. In *Environmental De-*

fense v. *Duke Energy Corp.*, 549 U.S. 561, 581 (2007), this Court found that the Fourth Circuit's "construction" of Clean Air Act regulations amounted to "implicit invalidation," thereby "implicating" the CAA's 60-day time limit for seeking judicial review. To no less extent, the Ninth Circuit "interpreted" an important element of the Silvicultural Rule into invalidity.[7]

The Ninth Circuit held that the Silvicultural Rule, if given a meaning consistent with "the intent of EPA," would be "inconsistent with" the CWA's point source definition "and is, to that extent, invalid." Pet. App. 32a; see also *id.* at 6a (on EPA's "reading, the Rule is inconsistent with the CWA and hence invalid"). On that basis, the court "construe[d] the Rule to be consistent with the statute" so that EPA's designation of silviculture runoff as "nonpoint source" applies only to *non-channeled* runoff. *Id.* at 6a-7a, 32a. This was no more than an "invalidation" in disguise.

The Ninth Circuit then imported the *rewritten* Silvicultural Rule into EPA's Phase I stormwater regulation, 40 C.F.R. § 122.26(b)(14). There is no other way to harmonize the court's reading of the Phase I regulation as unambiguously requiring permits for channeled silvicultural runoff with that regulation's express exclusion of runoff covered by the Silvicultural Rule from the scope of discharges "associated with industrial activity." The Phase I regulation's reference to the Silvicultural Rule, the Ninth Circuit held, "does not, indeed cannot, exempt such

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[7] The Court did not rule on the significance of the CAA's judicial review provision in *Duke Energy* because—unlike here—it was not addressed below. 549 U.S. at 581.

discharges from EPA's Phase I regulations," even though "EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program mandated by § 402(p)" was "clear." Pet. App. 38a, 42a. The effect of that holding was to invalidate an element of EPA's stormwater regulation.

The United States' contention that the Ninth Circuit engaged only in "interpretation" of regulations "in a manner different" from an EPA construction that was "contrary to the CWA" is mere wordplay. U.S. Cert. Am. Br. 9. For 35 years, the meaning of the Silvicultural Rule has been clear: precipitation runoff from forest roads, whether or not collected in ditches, is nonpoint source and not subject to permitting. And since its adoption in 1990, EPA's Phase I rule has made clear that collected runoff is not a point source discharge "associated with industrial activity." EPA has reiterated these interpretations time and again, and has enforced each consistently from the outset.

The Ninth Circuit interpreted the rules to reach a contrary result only because it thought EPA's reading inconsistent with the CWA, and thus unenforceable. The appropriate way to look at its decision is that the Ninth Circuit *invalidated* important aspects of rules of long standing, substituting alternative rules of its own creation. A court cannot escape the strictures of Section 509(b) by first invalidating a regulation and then promulgating a different one in its place in the name of "interpretation."[8] The Ninth

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[8] The Government analogizes the Ninth Circuit's approach to interpreting a statute narrowly to ensure its constitutionality. U.S. Cert. Am. Br. 9-10. But the CWA's specification of different

Circuit's reliance on cases in which "federal courts have invalidated EPA regulations" shows that it well understood this to be the effect of its ruling. Pet. App. 44a-45a.

C. The Statutory Exception For Grounds Arising After The Filing Deadline Is Inapplicable.

Recognizing that it was engaged in judicial review of EPA rules, the Ninth Circuit relied for its "subject matter jurisdiction" on the exception in Section 509(b)(1) for "grounds arising after the 120-day filing window." Pet. App. 7a. But that exception is inapplicable.

The purported post-promulgation ground giving rise to jurisdiction was the Government's adoption "for the first time in its initial amicus brief in this case" of a "reading of the Silvicultural Rule" that "does not require permits for silviculture stormwater runoff." Pet. App. 6a-7a. That is incorrect.

First, the exception for new "grounds" simply extends the 120-day window; it has no bearing on the statutory requirements that (1) judicial review actions be filed in a court of appeals against EPA, or (2) enforcement proceedings not be used for judicial review—both of which were violated here.

Second, a "provision for judicial review" for "suits based on newly arising grounds" applies only with respect to "an event that ripens a claim." *Chamber of Commerce of United States* v. *EPA*, 642 F.3d 192, 208 n.14 (D.C. Cir. 2011). See also *Coal. for Responsible Regulation, Inc.* v. *EPA*, 684 F.3d 102, 129-130 (D.C.

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forums and procedural mechanisms for invalidating and enforcing EPA regulations makes that analogy specious.

Cir. 2012). Such ripeness exceptions are common in regulatory statutes, allowing courts to dismiss unripe appeals and authorize appeal once outstanding factual contingencies have been resolved. *E.g.*, *Clean Air Implementation Project* v. *EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998); *Atl. States Legal Found., Inc.* v. *EPA*, 325 F.3d 281, 285-286 (D.C. Cir. 2003).

Here, any challenge to the Silvicultural Rule was manifestly ripe within 120 days after its 1976 promulgation or 1980 revision. Any challenge to EPA's Phase I stormwater regulation was ripe within 120 days of its promulgation in 1990. Claims are unripe if an interpretation's inconsistency with the statute is "only speculative." *Coalition*, 684 F.3d at 131. There has never been anything "speculative" about EPA's understanding of these rules, which has been clear for decades. EPA consistently has expressed (and acted on) the view that the regulations exclude collected forest road runoff from the permit requirement.

The Government's initial amicus brief below did not adopt that view for "the first time," but reiterated a long-held position. Reiteration does nothing to reopen a rule for judicial review. That was the D.C. Circuit's conclusion in *American Road & Transportation Builders Association* v. *EPA*, where it rejected petitioner's contention that EPA's description of existing regulations in a later rulemaking "effectively reopened" those regulations to judicial review. 588 F.3d 1109, 1114 (D.C. Cir. 2009). The court explained that "the agency gave no 'indication that [it] had undertaken a serious, substantive reconsideration' of the rules in question." *Id.* at 1115. Here, too, the United States did not reopen any issue about the scope of the rules at issue by its amicus filing below.

The basis for NEDC's challenge to the rules at issue was no different when it filed this suit in 2006 than it would have been in 1976, 1980, or 1990. NEDC was established in 1969 (http://tiny.cc/NEDC) and has no excuse for not filing a judicial review action in the court of appeals at the proper time. Respondent filed its claim in the wrong court, under the wrong statutory provision, and much too late.

D. The Ruling Below Undermines The Purposes Of The CWA's Jurisdictional Requirements.

Congress mandated that challenges to EPA actions identified in Section 509(b)(1) be filed in a court of appeals within 120 days to avoid piecemeal district court rulings and ensure early and authoritative resolution of any challenge. Preventing a multiplicity of judicial review proceedings ensures that "the substantive provisions of the standard would be uniformly applied and interpreted." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978). And the time limit provides EPA, regulated parties, and the public with certainty. Cf. *RSR Corp.* v. *EPA*, 102 F.3d 1266, 1269 (D.C. Cir. 1997) (CERCLA's time bar reflects "a deliberate congressional choice to impose statutory finality").

Allowing the validity of EPA regulations to be determined in citizen suits years or decades after a rule takes effect would inundate district courts with belated challenges to established regulations. The result would be inconsistent rulings and confusion among regulators and the regulated. Furthermore, because citizen suits often do not name EPA as a party, EPA's ability to defend its rules would be compromised and the impact of any decision on the agency would be uncertain. Here, EPA was not a de-

fendant and is not bound by the judgment even in the Ninth Circuit. See 1JA 52 n.1. Judicial review actions, by contrast, lie against the agency, and when multiple petitions for review are filed they are consolidated in a single case to provide an authoritative national ruling. 28 U.S.C. § 2112(a)(3).

Complying with EPA rules "can entail enormous up-front investments of money, effort, and advance planning. Both the agency and the private sector have interests in getting the legality of these rules settled one way or the other relatively quickly." Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2204-2205 (2011). To accomplish that goal, Congress chose an "orderly approach": allocating judicial review "to reconcile society's competing goals of restraining government abuses and expediting the implementation of pressing regulatory programs." *Id.* at 2238. This Court should reverse the Ninth Circuit's jurisdictional ruling to restore Congress's orderly allocation of judicial review and citizen suit proceedings.

CONCLUSION

The judgment of the court of appeals should be reversed. Alternatively, the judgment should be vacated and the case remanded with instructions to dismiss for want of subject matter jurisdiction.

Respectfully submitted.

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AUGUST 2012

RECORD AND BRIEFS

Nos. 11-338 and 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether 33 U.S.C. § 1369(b) of the Clean Water Act, which precludes plaintiffs in citizen suits from challenging certain kinds of agency action, applies in this case and thus limits the interpretive pathways available to this Court.

2. Whether a permit under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) is required for pipes, ditches, and channels that collect polluted stormwater from active-hauling logging roads and discharge it into navigable waters.

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BRIEF FOR RESPONDENT

INTRODUCTION

This case presents an issue of first impression: whether the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permit requirement applies to pipes, ditches, and channels that collect polluted stormwater from active-hauling logging roads and discharge it into navigable waters. Prior to this litigation, no federal appellate court had ever considered the question and, as the United States acknowledges, the Environmental Protection Agency had never taken a clear position on the subject.

Nevertheless, claiming to have assumed for years that the Act did not apply to them, petitioners and their amici urge this Court, on numerous policy grounds, to exempt these discharges from the NPDES program. But the simple reality is that these parties are making their arguments in the wrong forum. This is a court of *law*. And the law that governs this case – the statutory provisions of the Act and, to the extent relevant, their implementing regulations – leaves not the slightest uncertainty that these discharges are subject to the NPDES permit requirement. What is more, there is good reason for this reality. This Court should affirm the judgment of the court of appeals.

STATEMENT OF THE CASE

A. Basic Precepts Of The CWA

Prior to 1972, federal law attempted to abate water pollution by "employ[ing] ambient water quality standards specifying the acceptable levels of pollution" in navigable waters. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). This system of regulation, however, "proved ineffective." *Id.* "The problems stemmed from the character of the standards themselves, which focused on the tolerable effects rather than the preventable causes of water pollution, from the awkwardly shared federal and state responsibility for promulgating such standards, and from the cumbrous enforcement procedures." *Id.* (footnote omitted).

In 1972, declaring that "'the Federal water pollution control program . . . has been inadequate in every vital aspect,'" Congress enacted amendments to federal law that became known as the Clean Water Act (CWA or "the Act"). *Id.* (omission in original) (quoting S. Rep. No. 92-414, at 7 (1971)). Foremost among the Act's innovations is the NPDES permit program. Under this program, every owner or operator of a "point source" of pollution – save exceptions irrelevant here – must obtain and comply with a permit authorizing the discharges. *Id.*; *see also* 33 U.S.C. §§ 1311(a), 1342(a).

The CWA defines the term "point source" in specific terms. A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Act carves

out one exception to this definition for certain "agricultural" discharges. *Id.* But while other industries, including the logging industry, have sought exclusion from the NPDES program, Congress has never seen fit to grant additional exemptions.[1] Accordingly, when the Environmental Protection Agency (EPA) has attempted on its own to exempt certain activities from the program, courts consistently have rejected those regulations as inconsistent with the CWA's statutory scheme. *See, e.g., Nat'l Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009) (regulation exempting pesticide residue); *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008) (regulation exempting discharges from vessels).

In amendments to this regime enacted in 1987, Congress dealt specifically with point-source discharges of stormwater. *See* 33 U.S.C. § 1342(p). These amendments give EPA discretion over whether to require NPDES permits for channeled stormwater from "relatively de minimus sources" – things such as rain gutters and similar devices at "churches, schools and residential properties." Pet. App. 37a.[2] But the amendments continue to insist that stormwater

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[1] The logging industry has unsuccessfully sought exemptions from the NPDES program on at least three occasions. *See* S. 1269 & H.R. 1749, 109th Cong. (1st Sess. 2005) ("The Administrator shall not require a permit under this section . . . for . . . silvicultural activities."); H.R. 3609 & H.R. 3625, 106th Cong. (2d Sess. 2000) (virtually the same language); *infra* at 37-38 (describing legislative effort in 1977).

[2] All citations to the Pet. App. are to the appendix to the petition in No. 11-347.

discharges "associated with industrial activity" require NPDES permits. 33 U.S.C. § 1342(p)(3)(A).

B. The CWA's Application To Logging Operations

This case does not involve mere "forest roads," all logging roads, or even all discharges from logging roads. Instead, this case concerns the relatively small subset of logging roads that facilitate active timber cutting and hauling, and that use man-made pipes, ditches, and channels to collect polluted stormwater and discharge it into navigable waters. It is important, therefore, first to describe timber harvesting operations and their use of logging roads, and then the history of EPA's regulations relating to discharges of pollutants from such operations.

1. *Logging operations and logging roads*

a. The logging business has come a long way since the brawny lumberjacks of yesteryear. Whereas logging in the nineteenth and early twentieth centuries was a fairly manual and ad hoc enterprise, states and private companies now actively manage large swaths of forest for industrial timber harvesting.

When a decision is made to harvest a tract of timber, the logging company brings in an assortment of heavy machinery. Mechanical harvesters and "feller bunchers" – some weighing up to twenty tons – fell the trees. These machines sometimes use continuous (or caterpillar) tracks to maneuver over bumpy and steep terrain. They have giant steel arms with spinning blades and claws at the end, so that in a matter of seconds they can saw trees off at their stumps, grab them, and set them aside. Skidders

and forwarders then arrive to drag the felled trees and to position them in loading areas. Another machine strips the limbs from the trees. Then log loaders lift logs onto massive trucks for hauling them to sawmills or other locations for processing. In short, "[w]hile most people are familiar with the iconic large handsaws of yore, hand axes, or even chainsaws, . . . [the] goal of modern harvesters is summed up in the phrase: no feet on the forest floor."[3] Massive equipment, with humans safely ensconced in climate-controlled environments, handles everything from cutting to hauling.[4]

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[3] WiseGeek, *What Equipment Is Used in Timber Harvesting?*, http://www.wisegeek.com/what-equipment-is-used-in-timber-harvesting.htm (last visited Oct. 12, 2012).

[4] A complete catalogue of logging machinery and equipment is available on the website of the Forestry Department at Virginia Tech University. *See Timber Harvesting (Logging) Machines and Systems*, Va. Tech Dep't of Forestry (Sept. 2007), http://tinyurl.com/NEDC1. For a video of a feller buncher at work, see Woodharvesting, *Feller Buncher Tigercat L870C on Steep Terrain*, YouTube (Mar. 27, 2011), http://tinyurl.com/NEDC1-1. For examples of typical log loaders doing their jobs, see Tigercat Forestry, *Tigercat 880 Logger*, YouTube (Oct. 26, 2011), http://tinyurl.com/NEDC1-5; Dasani110, *Hauling Logs, Peterbilt 378 550 3406E CAT*, YouTube (Sept. 28, 2007), http://tinyurl.com/NEDC1-9. For photos of various kinds of logging trucks, see *Logging Truck Stock Photos and Images*, Fotosearch, http://www.fotosearch.com/photos-images/logging-truck.html (last visited Oct. 12, 2012). Of course, these videos and photos are not part of the record in this case. But because the district court granted petitioners' motions to dismiss without taking any evidence, respondent references this publicly available information to give this Court a sense of what it must assume respondent would be able to prove in this case.

b. Logging roads are integral to this operation. These roads provide the only access to harvesting sites, allowing the machinery used in this process to get where it needs to be. And once the logs are loaded onto trucks, the roads provide the only pathways for trucks to transport logs (that is, the raw material) out of the forest.

Because of their importance, as well as their fragility in hostile environments, logging roads are carefully engineered facilities. After a trail is cleared and graded, tons upon tons of crushed rock are brought in from a quarry. Because only certain kinds of rock are suitable for creating road surfaces, the rock is often not native to the immediate environment where it is deposited. Road building equipment then aligns and levels the rock to create the road surface. Over time, the heavy logging trucks and other machinery that pass over these roads pulverize the gravel, creating a road surface littered with finely ground, loose matter. Pet. App. 4a.[5]

Logging roads, of course, also have to account for rainwater – particularly the heavy and persistent rains that fall during storm season in the coastal rain forests of the Pacific Northwest. Accordingly, logging roads are either "outsloped," to allow stormwater to wash away downhill, or they are crowned to ensure that stormwater drains off to their sides. 2JA 99.

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[5] For videos capturing this phenomenon, see Chipensaw, *Steep Grade Haul Road*, YouTube (Aug. 23, 2011), http://tinyurl.com/NEDC2-4; 104bigTruck, *Beautiful Kenworth Logging Truck Pulled Around 4 Switchbacks*, YouTube (July 8, 2009), http://tinyurl.com/NEDC2-8.

When logging roads are crowned, they require man-made pipes, ditches, and channels to function properly. *See* 2JA 83. Road engineers strategically place and interlock these drainage mechanisms to collect and divert as much stormwater as possible away from the road surface. Ditches running alongside roads collect the water; culverts (*i.e.*, pipes running underneath the roads) and other channels route the water downhill; and then these man-made conveyances discharge the stormwater.

At least in the areas at issue here, more than 50% – and perhaps as much as 75% – of crowned logging-road stormwater channeling systems discharge the stormwater they collect onto the forest floor, where it can percolate into the ground and leave suspended sediments behind. 2JA 15. Indeed, the Oregon Department of Forestry has published manuals and technical papers identifying the forest floor as the proper place to deliver logging road stormwater. C.A. ER 54 at 107.

But some conveyance systems discharge stormwater directly into rivers and other navigable waters. It is those particular kinds of discharges that are at issue here.

c. When stormwater collects in ditches and channels alongside logging roads, it picks up chemical residue from the vehicles that have traveled over them, debris from log cutting and processing, and – most of all – pulverized rock and sand from the ground-up road surface. Pet. App. 4a. All of these things are classified as "pollutants" under the CWA. 33 U.S.C. § 1362(6). When washed through drainage systems and conveyed by pipes and ditches into navigable water, this polluted stormwater "deposits

large amounts of sediment into streams and rivers." Pet. App. 4a; *see also* 2JA 27-29.

This sediment has numerous deleterious effects. *See generally* Amicus Br. of W. Div. of Am. Fisheries Soc'y. For one thing, it "adversely affects fish – in particular, salmon and trout – by smothering eggs, reducing oxygen levels, interfering with feeding, and burying insects that provide food." Pet. App. 4a. More fundamentally, the accumulation of fine sediment alters the clarity and – when it settles in streambeds – the flow of rivers. 2JA 17. It also decreases water depth, causing water temperature to increase. 2JA 29.

2. *Regulatory history*

a. Shortly after the CWA became law, EPA adopted a regulation exempting all pollution from "silvicultural" (that is, logging) operations from the NPDES permit program. 40 C.F.R. § 125.4 (1975). EPA acknowledged that many discharges from such operations "fall within the definition of point source." *NRDC v. Train*, 396 F. Supp. 1393, 1395 (D.D.C. 1975). But it contended in litigation challenging its rule that such discharges were "ill-suited for inclusion in [the NPDES] permit program," *id.*, because they typically occur as a result of "rainfall runoff," which EPA asserted is difficult to regulate even when it "flows into ditches or is collected in pipes before discharging into streams," 40 Fed. Reg. 56,932 (Dec. 5, 1975).

A district court invalidated EPA's regulation, and the D.C. Circuit affirmed. *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The D.C. Circuit held that "legislators did not intend" to give EPA "broad discretion to exempt large classes of point sources"

from the CWA. *Id.* at 1375. And because the CWA "relie[s] on explicit mandates to a degree uncommon in legislation of this type," "[c]ourts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute." *Id.* at 1375, 1377.

b. While the *Costle* case was working its way through the courts, EPA promulgated a regulation known as the Silvicultural Rule. The rule coined a new term, "silvicultural point source," and defined that term as "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters." 40 C.F.R. § 124.85 (1976). The regulation added that the term "[s]ilvicultural point source" "does not include *nonpoint* source activities inherent to silviculture such as . . . harvesting operations, surface drainage, and road construction and maintenance from which runoff results from precipitation events." *Id.* (emphasis added).

After the D.C. Circuit confirmed in 1977 that the original 1973 regulation conflicted with the CWA's definition of "point source," EPA amended the Silvicultural Rule. In particular, EPA modified the Rule's culminating phrase to make clear that it excluded from its definition of "[s]ilvicultural point source" only "natural runoff" from "nonpoint source" activities. 40 C.F.R. § 122.27. That is how the Rule still reads.

c. After Congress's enactment of the 1987 Stormwater Amendments to the CWA – which, as

noted above, reinforced the permitting requirement for discharges of stormwater "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B), (3)(A) – EPA promulgated so-called "Phase I regulations" to implement Congress's specific directive.

The Phase I regulations (save exceptions not relevant here) provide that "[f]acilities classified as Standard Industrial Classification[] [SIC] 24" "are considered to be engaging in 'industrial activity.'" 40 C.F.R. § 122.26(b)(14)(ii). Included within SIC 24 is SIC 2411 ("logging") which, in turn, includes "[e]stablishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials." 2JA 53 (quoting "Industry number 2411").

C. Procedural History

1. Respondent Northwest Environmental Defense Center commenced this enforcement action in 2006. Invoking the CWA's "citizen suit" provision, 33 U.S.C. § 1365(a), it sued various Oregon officials (collectively, "the State") and certain private logging companies ("Industry Petitioners"), for violating 33 U.S.C. §§ 1311(a) and 1342 – as well as the Act's implementing regulations – by discharging pollutants into navigable waters without a permit.

In particular, respondent's complaint alleges – and because this case reaches this Court on petitioners' motion to dismiss, all of these allegations must be taken as true – that the Industry Petitioners have purchased the right to harvest timber from tracts in the Tillamook State Forest. The contracts memorializing those sales require the Industry Petitioners to use particular logging roads to access

and haul this timber. 2JA 7-8, 19-20; C.A. ER 47 at 98-99. The contracts also require the Industry Petitioners to maintain these roads, as well as their water collection and drainage systems. 2JA 7-8.

Those roads are named Trask River Road and Sam Downs Road. The section of the Trask River Road at issue runs roughly parallel to the South Fork Trask River. The section of the Sam Downs Road at issue runs roughly parallel to the Little South Fork of the Kilchis River. Both rivers are tributaries of Tillamook Bay and support runs of threatened coastal coho salmon, which are protected under the Endangered Species Act in part because of impacts from sediment pollution. Both rivers are also home to several fish species that the State lists as "species of concern" – coastal cutthroat trout, chum salmon, and Pacific and river lamprey. 2JA 17.

Because these two logging roads are situated in a temperate rain forest and are carved out of sometimes steeply sloped terrain, the roads are equipped with carefully engineered water collection and drainage systems. In the few miles of each road at issue here, the roads use integrated networks of pipes, ditches, and channels to collect and convey stormwater directly into the rivers alongside which they run. 2JA 2, 15, 17-18.

In 2006, the Industry Petitioners were actively engaged in timber cutting, loading, and hauling on and along Trask River and Sam Downs Roads. 2JA 1-25. On numerous days during this period, the roads' pipes, ditches, and channels discharged polluted stormwater into the adjacent rivers and streams. 2JA 22-23. A video that respondent's

counsel took while investigating this case shows this process in action. It shows stained, chocolate-brown colored runoff (stormwater that has picked up sand, dirt, and other debris) being collected, channeled, and discharged directly into a clear, blue-green river. *See* http://tinyurl.com/NEDC5-1.[6] These discharges generated extremely high levels of sediment pollution, resulting in turbidity readings up to 971 times background levels. 2JA 33, 35.[7]

2. Shortly after respondent filed its complaint, petitioners moved to dismiss under Rule 12(b)(6). While those motions were pending, the United States filed an amicus brief announcing "for the first time" that EPA interpreted its regulations to render *all* discharges of polluted stormwater from logging roads exempt from NPDES permitting requirements. Pet. App. 7a, 9a; *see also id.* 109a-114a; U.S. Br. at Cert. 10. Relying solely on the Silvicultural Rule, the district court dismissed the complaint, holding that petitioners' "road/ditch/culvert system" is not a point source of pollution. Pet. App. 57a-64a.

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[6] As with the videos cited above, this video is not part of the record in this case because the case arrives here on a motion to dismiss. Respondent references this information, therefore, to show this Court in a visual way what it plans to prove on remand.

[7] A turbidity reading measures the extent to which sediment or other suspended solids are causing water to become cloudier than normal. Oregon water quality standards typically prohibit more than a 10% increase in turbidity. Or. Admin. R. 340-041-0036.

3. The court of appeals reversed. Applying the plain text of the CWA's definition of "point source," the Ninth Circuit explained that stormwater from logging roads is a point source when, as here, it "is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances." Pet. App. 11a.

The court of appeals next held that neither EPA's Silvicultural Rule nor its Phase I regulations implementing the 1987 Stormwater Amendments exempt the discharges at issue here from the NPDES permit requirement. Turning first to the Silvicultural Rule, the Ninth Circuit explained that the Silvicultural Rule's reference to "natural runoff" from nonpoint source silvicultural activities is susceptible to "two possible readings." Pet. App. 32a. Under the first reading (the one advanced by EPA), stormwater that runs off logging roads can never discharge from a point source. Under a second reading, such stormwater is generally not a point source, but it becomes one (because it is no longer the product of a "natural" process) when it is collected by man-made pipes, ditches, and channels and discharged into navigable waters. Because only the latter reading would "allow [it] to construe the Rule to be consistent with the statute," the court concluded it was required to adopt that interpretation. *Id.* 32a-33a.

As for the Phase I regulations, the Ninth Circuit determined that they plainly require permits for the discharges at issue. Pet. App. 38a-42a. Those regulations, the Ninth Circuit explained, "provide[] that facilities classified as SIC 24 are among 'those considered to be engaging in industrial activity.'" *Id.*

39a (quoting 40 C.F.R. § 122.26(b)(14)(ii)). SIC 24, as noted above, covers "logging," including "cutting timber and producing . . . primary forest or wood raw materials." 2JA 64.

4. After petitioners sought rehearing, the court of appeals sought supplemental briefing on whether 33 U.S.C. § 1369(b) of the CWA has any impact on this case. Specifically, the Ninth Circuit asked whether that provision, which requires challenges to EPA actions "issuing or denying any [NPDES] permit" to be brought directly in the court of appeals within 120 days, 33 U.S.C. § 1369(b)(1), precludes respondent's lawsuit or limits a court's analytical options in resolving it. Pet. App. 5a. The United States maintained that Section 1369(b) poses no problem because the court of appeals did not invalidate any regulation. At most, the Government stated, the Ninth Circuit held that certain ambiguous regulations must be construed in a manner consistent with the statute. *Id.* 7a. The Ninth Circuit "agree[d]" with that submission and adhered to its judgment. *Id.* 6a-7a.

5. This Court granted certiorari. 132 S. Ct. ___ (2012).

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Act's NPDES permit requirement applies to pipes, ditches, and channels that collect polluted stormwater from the active-hauling logging roads at issue here and discharge it into navigable waters.

I. Section 1369(b) does not interfere with subject matter jurisdiction here or even restrict the

interpretive pathways available for resolving respondent's claim. That provision precludes bringing a citizen suit *challenging* certain EPA actions. Respondent, however, is not challenging any EPA action. Instead, it seeks to *enforce* EPA's pertinent regulations, which require – or at the very least are ambiguous and must be construed to require – permits for the discharges at issue.

Even if respondent's statutory arguments implied that certain regulations were invalid for being inconsistent with the Act, it would not matter. Section 1369(b) applies only (as is relevant here) to agency action "issuing or denying any permit" under the NPDES program. Regulations exempting discharges from the NPDES program do neither of these things. Accordingly, this Court need not fret about Section 1369(b). This Court may – indeed, must – use ordinary principles of statutory interpretation to resolve respondent's substantive claim.

II. When active-hauling logging roads use pipes, ditches, and channels to collect polluted stormwater and discharge it into navigable waters, the Clean Water Act – and, to the extent relevant, its implementing regulations – require NPDES permits for such discharges. The Act generally requires permits for all discharges from "point sources," a term that includes "any pipe, ditch, [or] channel" that discharges pollutants into navigable waters. 33 U.S.C. § 1362(14). Those are precisely the types of conveyances at issue here. And nothing in EPA's "Silvicultural Rule" undercuts this analysis. That Rule says simply that "non-point source" "natural runoff" is not a "silvicultural point source." 40 C.F.R.

§ 122.27(b). This case does not involve "non-point sources" or "natural runoff"; instead, it concerns stormwater that is collected and channeled by man-made conveyances.

Nor do the Act's 1987 Stormwater Amendments exempt the discharges at issue from the NPDES program. To the contrary, those amendments mandate that point source discharges of stormwater "associated with industrial activity" require NPDES permits. 33 U.S.C. § 1342(p)(3)(A). Logging roads are "associated with" logging operations, and petitioners' highly mechanized tree harvesting and hauling activities are plainly "industrial" in nature. If any ambiguity existed on that score, EPA's regulations would erase it. Those regulations provide that "[f]acilities classified as Standard Industrial Classification[] [SIC] 24" are industrial, 40 C.F.R. § 122.26(b)(14)(ii), and SIC 24 includes "logging" establishments, 2JA 64.

III. None of petitioners' or the United States' policy or reliance arguments trump the plain meaning of the CWA. Nor are they even persuasive on their own terms. The accumulation of fine sediment from logging roads in our nation's navigable waters presents an acute environmental problem. While the Act affords EPA considerable flexibility in fashioning permit requirements and timetables, it does not allow the agency to ignore the problem entirely.

ARGUMENT

It should tell this Court that something is amiss when both groups of petitioners begin their legal arguments by discussing *regulations* instead of *statutory provisions*. *See* Industry Br. 19; State Br. 20-31. And it should tell this Court even more when the Solicitor General, supporting petitioners, files a brief arguing that this Court lacks the power even to consult or apply the pertinent statutory provisions.

Indeed, something is amiss. Rarely is statutory text so plainly dispositive of a case that makes it all the way to this Court. Accordingly, respondent first debunks the notion that 33 U.S.C. § 1369(b) somehow precludes this Court from consulting the Act's text. Then, applying the familiar two-step framework enunciated in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), respondent shows that when stormwater from active-hauling logging roads is channeled into man-made pipes, ditches, and channels, the plain text of the CWA – and, to the extent relevant, applicable regulations – require parties to obtain permits before discharging that stormwater into navigable waters.

I. Section 1369(b) Does Not Restrict The Interpretive Pathways Available To This Court.

The CWA "clearly confers jurisdiction over this citizen suit" for discharging polluted industrial stormwater without a permit. U.S. Br. 17; *see* 33 U.S.C. § 1365(a), (f). Petitioners and the United States argue, however, that Section 1369(b) – which requires certain kinds of EPA action to be challenged directly in the courts of appeals, generally within 120

days – restricts "the range of arguments" that this Court may consider in assessing respondent's substantive claim. U.S. Br. 17.

Not so. Section 1369(b) does not apply here because respondent is seeking to enforce, not to challenge, the CWA and pertinent regulations. And even if – as petitioners contend – respondent's statutory arguments implied that certain regulations were invalid, Section 1369(b) still would not bar this action because that provision does not apply to regulations that exempt discharges from the NPDES system.

A. Section 1369(b) Does Not Apply Because Respondent Is Seeking To Enforce, Not To Challenge, The CWA And Pertinent Regulations.

Section 1369(b)(2) precludes plaintiffs in a citizen suit from challenging certain kinds of agency action. It poses no obstacle, however, when plaintiffs seek to "enforce" regulations. 33 U.S.C. § 1365(a). Accordingly, neither petitioners nor the United States dispute – nor could they – that Section 1369(b) is irrelevant insofar as one of two possible scenarios is present here: (1) EPA's interpretation of its regulations is plainly inconsistent with the text of the regulations, *see Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012); or (2) the regulations are ambiguous but better read to require petitioners to seek permits, and EPA's contrary view is not entitled to deference, *see id.*; *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). In either case, simply

enforcing the pertinent regulations is all that is necessary to give respondent relief.

Section 1369(b) also is irrelevant in a third scenario – namely, if the regulations are ambiguous and must be construed contrary to EPA's view in order to prevent a conflict with the CWA itself. As this Court explained in *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007), when a court adopts "a purposeful but permissible reading of the regulation . . . to bring it into harmony with [its] view of the statute," the court does not run afoul of statutes such as Section 1369(b) because such judicial action is not "a determination that the regulation as written is invalid." *Id.* at 573; *see also id.* at 581; Industry Br. 52-55. To the contrary, such judicial action saves a regulation from invalidity and enables its enforcement.

In an about-face from its position in the court of appeals and at the certiorari stage, the United States disagrees on this third point. The Government now argues that Section 1369(b) precludes this Court from rejecting EPA's interpretation of ambiguous regulations "based on [this Court's] view that a different construction is necessary to prevent a conflict with the governing statute." U.S. Br. 21-22; *compare* Pet. App. 6a-7a; U.S. Br. at Cert. 9-10. In support of this new argument, the United States relies upon a single sixty-seven-year-old case that it has never previously mentioned in this litigation: *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

Seminole Rock cannot bear the weight the Government places upon it. It is well established, as

a general rule, that this Court may not defer to an agency's interpretation of an ambiguous regulation if the interpretation "violate[s] the Constitution *or a federal statute.*" *Stinson v. United States*, 508 U.S. 36, 45 (1993) (emphasis added); *see also, e.g., Talk Am.*, 131 S. Ct. at 2263 (rejecting proposed interpretation of regulation because it "would directly conflict with the statutory language"); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 285-86 (2009) (ensuring that regulation, as interpreted by the agency, was "a sensible and rational construction" of relevant statutory provisions). Otherwise, agencies would be able to flout the directives of Congress by promulgating ambiguous regulations and then interpreting them contrary to statutory commands.

Nothing in *Seminole Rock* holds that this general rule does not apply in this context as well. In that case – as would be the situation here if Section 1369(b) applied to the type of regulations at issue – a separate and exclusive procedure existed for challenging the validity of the agency's regulation. 325 U.S. at 418-19; *see also Lockerty v. Phillips*, 319 U.S. 182, 185-86 (1943). This Court noted, therefore, that it did not have the authority to "reach any question . . . as to the constitutionality or statutory validity of the regulation." *Seminole Rock*, 325 U.S. at 418. But this Court did *not* hold that it lacked the power in this setting to interpret an ambiguity in the regulation to avoid a conflict with the statute. To the contrary, this Court explained – consistent with its later pronouncement in *Duke Energy*, 549 U.S. at 573 – that even within that case's procedural posture, "[t]he intention of Congress or the principles of the

Constitution in some instances may be relevant in the first instance in choosing between various constructions." *Seminole Rock*, 325 U.S. at 414. This Court simply declined to engage in any such statutory avoidance in that case because it found the regulation to be unambiguous. *See id.* at 415-18.

Lest there be any doubt, foreclosing courts in this setting from engaging in statutory avoidance would have perverse consequences. As the Government itself explained to the court of appeals, every time EPA issued regulations covered by Section 1369(b) or a similar statute, parties would be required immediately to "challenge [any] potential regulatory interpretations that are textually plausible" and that they believe would violate the statute. Pet. App. 7a.[8] This would open the floodgates to innumerable "hypothetical" lawsuits – most of them for no good reason because agencies presumably would typically construe ambiguous regulations to comport with statutory limitations. *Id.*

The Government's only response to this problem in its current brief is to suggest that when an agency clarifies its view of an ambiguous rule in an amicus brief, that filing might "provide a new opportunity for review of the rule itself" under Section 1369(b)(1)'s exception for newly arising grounds. U.S. Br. 22 n.8. But this approach – even if compatible with the text

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[8] Other Acts that have provisions similar to Section 1369(b) making certain EPA actions immediately reviewable in courts of appeals include the Clean Air Act, 42 U.S.C. § 7607(b)(1); the Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a)(1); and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276(a)(1).

of the statute – would be utterly unworkable. As an initial matter, it is impossible to hold the general public responsible for knowing what EPA or any other agency says in every amicus brief it files in every court across the country. So the only entities with any realistic opportunity to challenge such agency actions in Section 1369(b) lawsuits would be the litigants in the case in which the agency filed its brief.

Even then, such challenges would raise a number of new complexities that would tangle up litigation for no good reason. A party unhappy with an agency's amicus filing would presumably have to seek a stay in the original case and file a brand new case in the court of appeals. Then the two courts (or perhaps the two panels of the same court) would either proceed simultaneously or would have to decide who goes first. Multiple questions would then arise. Should the court in the enforcement action first decide whether the agency's proposed interpretation is correct and otherwise entitled to deference? Or should the court in the Section 1369(b) case first decide whether the agency's interpretation, if correct, would violate the statute? Meanwhile, what happens with respect to discovery and motion practice in the enforcement action, and how would appeals be handled? None of these quandaries have easy answers.

Thankfully, there is no reason to try to answer them. *Duke Energy* is correct: a court in a civil enforcement action may, as the court of appeals did here, adopt "a purposeful but permissible reading of the regulation . . . to bring it into harmony with [its]

view of the statute." 549 U.S. at 573. And that is all that is required to resolve this case. Pet. App. 5a-7a.

B. Even If Respondent's Statutory Arguments Dictated That Certain Regulations Were Invalid, Section 1369(b) Still Would Not Preclude Relief Because The Pertinent Regulations Did Not Issue Or Deny Any Permit.

Even if respondent's argument that the CWA unambiguously requires permits for the discharges at issue implied that certain regulations were invalid, Section 1369(b) would still not apply here. The text, structure, and purpose of the provision – as well as applicable precedent – demonstrate that it does not apply to the regulations relevant here because those regulations did not issue or deny an NPDES permit.

1. *Text.* Section 1369(b)(1) enumerates seven discrete types of EPA action to which its system of review applies. Those categories are exclusive and hardly encompass – as the State would like – all "EPA[] rules promulgated under the CWA." State Br. 32. As the Second Circuit explained shortly after the Act's passage, the "specificity of section [1369(b)] in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable." *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976). "[O]nly those EPA actions specifically enumerated in 33 U.S.C. § 1369(b)(1)" are subject to that statute. *Friends of the Earth v. EPA*, 333 F.3d 184, 193 (D.C. Cir. 2003).

The Industry Petitioners and the United States accept that Section 1369(b) applies only to certain categories of regulations but assert that it applies here because it applies to all "NPDES regulations." U.S. Br. 16; *accord* Industry Br. 51. But the statute contains no such language. Instead, Subsection 1369(b)(1)(F) – the only subsection even conceivably relevant here – covers challenges only to actions "*issuing or denying any permit* under [the NPDES program]." 33 U.S.C. § 1369(b)(1)(F) (emphasis added).

Quite plainly, EPA has neither issued nor denied any NPDES permit respecting the discharges at issue. Petitioners have not even applied for such a permit. At most, according to petitioners, EPA has issued certain regulations sorting out which kinds of discharges require permits and providing that petitioners need *not* seek permits for the discharges at issue. Even assuming for the moment that petitioners' view of the regulations is accurate, such regulations are manifestly not the same as orders issuing or denying permits themselves.

EPA itself has previously recognized as much. Upon providing notice of various regulations governing the NPDES program, EPA explained that under Section 1369(b), "review is not provided for actions in issuing general regulations governing the issuance of NPDES permits." 44 Fed. Reg. 32,855 (June 7, 1979); *see also Am. Iron & Steel Inst. v. EPA*, 543 F.2d 521, 524-25 (3d Cir. 1976) (successfully taking same position). Quoting the text of Subsection 1369(b)(1)(F), EPA explained that the statute covers only the results of "individual permit issuance actions." 44 Fed. Reg. at 32,855. That

construction of the statute is clearly correct, and EPA offers no explanation for its new position here.

2. *Structure.* The CWA's 1987 amendments regulating stormwater discharges confirm that the realm of EPA actions that comprise "issuing or denying any permit" for purposes of Subsection 1369(b)(1)(F) does not include EPA regulations that simply sort out which discharges are covered by the NPDES program. In those amendments, Congress directed EPA to "establish regulations setting forth the permit application requirements" for certain discharges of stormwater by a certain date. 33 U.S.C. § 1342(p)(4)(A). Congress then required "[a]pplications for permits" to be filed one year after that date. *Id.* Finally, Congress directed EPA within one more year of filing to "*issue or deny each such permit.*" *Id.* (emphasis added).

The Stormwater Amendments thus conceive of regulations establishing the parameters of the NPDES permitting regime as quite distinct from agency action actually "issuing or denying" NPDES permits; the latter type of action occurs only after the agency has issued general regulations and persons have applied for permits. And because a "standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning," *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007), the phrase "issuing or denying any permit" in Subsection 1369(b)(1)(F) should likewise

be construed to cover only the processing of permit applications.[9]

3. *Purpose.* It is critical that Subsection 1369(b)(1)(F) remain confined to its proper sphere. *See generally* Amicus Br. of Law Professors on Section 1369(b) Jurisdiction. As several courts of appeals have explained, "[r]eviewability under section 1369 carries a particular sting" – namely, the preclusion of any challenge to EPA action not brought within 120 days. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). Therefore, "the more [regulations courts] pull within [§ 1369(b)], the more arguments will be knocked out by inadvertence later on – and the more reason firms will have to petition for review of everything in sight." *Id.* (second alteration in original) (quoting *Am. Paper Inst. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (Easterbrook, J.)). Such petitions needlessly burden the federal courts.

Worse yet, transforming Subsection 1369(b)(1)(F) into a general catch-all covering any EPA regulation relating to the NPDES program would require the courts of appeals to resolve legal challenges to such regulations "in a vacuum." *Am. Iron & Steel Inst.*,

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[9] Other statutory regimes use the words "issue or deny a permit" to mean the same thing. *See, e.g.*, 33 U.S.C. § 2602(e) ("The Secretary, after consultation with the Administrator, shall issue or deny a vessel permit under this section within 30 days after receiving a complete application."); 42 U.S.C. § 7661b(c) ("The permitting authority shall approve or disapprove a completed application . . . and shall issue or deny the permit, within 18 months after the date of receipt thereof.").

543 F.2d at 528. When EPA, for example, exempts a class of discharges from the NPDES program, a lawsuit filed in a district court may generate a record through adversarial litigation that helps a court assess the validity of EPA's interpretation of the Act. Such litigation concerning the "concrete" "effects" of agency action, as this Court has noted, is far preferable to "abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

Petitioners' only objection to following this generally preferred method of litigation is that "[c]omplying with EPA rules can entail enormous up-front investments of money, effort, and advance planning." Industry Br. 58 (internal quotation marks and citation omitted). But that is no objection at all in the context of regulations that purportedly exempt discharges from the NPDES permit requirement. In that situation, the regulations do *not* require businesses to take the steps necessary to comply with the NPDES program. Accordingly, even if petitioners' view of the regulations were correct and this Court were allowed to rewrite and expand the reach of Section 1369(b) to enable immediate challenges to this type of EPA action, there would be no policy rationale for doing so.

4. *Precedent.* That leaves only the passing suggestions from petitioners and the United States that this Court's decisions in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980) (per curiam), and *E.I. Dupont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), construed Section 1369(b) to require immediate challenge to all "NPDES permitting

regulations." U.S. Br. 16 n.7; *accord* Industry Br. 51 n.6. Neither decision, however, did any such thing.

In *Crown*, businesses applied for and received a NPDES permit from a state authorized to issue such permits itself. But EPA then exercised its statutory right to "veto" the permit. 445 U.S. at 193. This Court held that when EPA "objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to 'den[y]' a permit within the meaning of § [1369(b)(1)(F)]." *Id.* at 195-96 (second alteration added). Far from supporting any application of Section 1369(b) here, that holding reinforces that the statute's text means what it says and covers only issuances or denials of permits after dischargers have applied for such permits.

E.I. Dupont is even farther afield from the situation at hand. The central question in that case was whether EPA had authority to enact regulations setting effluent limitations for classes or categories of dischargers. 430 U.S. at 124. That question gave rise to a "subsidiary" jurisdictional issue: if EPA was allowed to issue effluent limitations by regulation, those regulations would be subject to Subsection 1369(b)(1)(E), which applies to agency action "promulgating any effluent limitation." *E.I. Dupont*, 430 U.S. at 124-25. This Court held that EPA may indeed establish categorical effluent limitations by way of regulation, thereby "necessarily resolv[ing] the jurisdictional issue as well." *Id.* at 136. That is the sum and total of *E.I. Dupont*. This Court held that EPA's regulation was subject to review under Subsection 1369(b)(1)(E) because it accomplished the *very* thing listed in that subsection: it promulgated an effluent limitation.

That holding is of no help to petitioners. An "effluent limitation" is "any restriction" on "chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11). EPA obviously has not promulgated any effluent limitation respecting the discharges at issue that respondent's view of the CWA would invalidate.

The Industry Petitioners and the Government nevertheless quote this Court's statement in *E.I. Dupont* that barring immediate review in that case would have produced "the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to § [1342] but would have no power of direct review of the basic regulations governing those individual actions." 430 U.S. at 136. In context, this Court's reference to "basic regulations governing those individual actions" refers to nothing more than regulations setting effluent limitations – the type of agency action at issue in the case and expressly listed in Subsection 1369(b)(1)(E). Nothing in that sentence has anything to do with Subsection 1369(b)(1)(F) or otherwise suggests that Section 1369(b) covers anything beyond the agency actions expressly enumerated by Congress.[10]

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[10] Although the Government also suggests (U.S. Br. 16 n.7) that federal appellate case law supports applying Section 1369(b)(1)(F) here, the Third and Ninth Circuits – in cases the Government ignores – have held that EPA regulations purporting to exempt certain discharges from the NPDES program are not reviewable as "issuances" or "denials" of

In short, Section 1369(b)(1)(F) applies only to the issuance or denials of NPDES permits. Because no relevant regulation here does either of those things, this Court is free – indeed, it is required – to employ its customary tools of statutory interpretation in assessing respondent's substantive claim.

II. The CWA Requires A Permit For Pipes, Ditches, And Channels That Discharge Polluted Stormwater From Active Industrial Logging Roads Into Navigable Waters.

The CWA generally prohibits the discharge of any pollutant from a "point source" into navigable waters without a permit. Pet. App. 9a; *see also* 33 U.S.C. §§ 1311(a), 1342. There is no dispute that the stormwater at issue contains pollutants or that it is being discharged into navigable waters. Nor have petitioners ever sought or obtained a permit. So two crucial questions – dependent, for the reasons described above, on ordinary *Chevron* analysis – remain: (A) whether the pipes, ditches, and channels that discharge the stormwater at issue are point sources; and (B) if so, whether the CWA's Stormwater

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permits. *See Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1015-18 (9th Cir. 2008); *Am. Iron & Steel Inst.*, 543 F.2d at 525-28. The D.C. Circuit also has invalidated such regulations without noting any impediment from Section 1369(b). *See NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The Sixth Circuit's decision in *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009), holding that Section 1369(b) applies in this context, is simply incorrect.

Amendments exempt these point sources from the Act's permitting system.

The CWA and, to the extent relevant, its implementing regulations make clear that the conveyances at issue here are "point sources," and that they are not exempt from the NPDES program.

A. The Discharges At Issue Are From "Point Sources."

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (internal quotation marks and citations omitted). Accordingly, respondent begins by showing that the CWA itself plainly deems the conveyances at issue here to be point sources. Respondent then shows that EPA's regulations, to the extent relevant, are – or, at the very least, can and thus must be construed to be – consistent with that result.

1. The Statute

The text, structure, and legislative history of the CWA dictate that the NPDES permit requirement applies to pipes, ditches, and channels that collect stormwater from logging roads and discharge it into navigable waters.

a. *Text.* The text of the CWA's definition of "point source" could hardly be more straightforward as applied to this case. That text defines the term as "any discernible, confined and discrete conveyance, including but not limited to *any pipe, ditch, channel,*

tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). The word "any" means all – "one or some indiscriminately of whatever kind." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Thus, because the conveyances at issue here are pipes, ditches, and channels, 2JA 17-18 – the very things mentioned in the statutory definition – they are plainly "point sources."

The Industry Petitioners and the United States nonetheless assert that "Congress expected EPA to exercise judgment in defining point source and nonpoint source pollution." Industry Br. 21; *see also* U.S. Br. 3. In particular, they contend that it requires interpretation and judgment to determine whether a conveyance is "discrete." Industry Br. 21-22; *see also* U.S. Br. 21. But these contentions miss the point. The generic requirements for covered conveyances – including that they be "discrete" – may be relevant in determining whether a conveyance not named in the statutory definition constitutes a point source. *See, e.g., Ass'n to Protect Hammersly, Eld, & Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1018-19 (9th Cir. 2002) (considering whether "mussel rafts" are point sources). But those requirements are immaterial as applied to conveyances, such as those at issue here, that are expressly listed in the statute.

An example illustrates the point. Imagine that a statute required certain people to obtain a permit before owning "any deadly weapon, including but not

limited to a firearm, knife, or crossbow." The word "deadly" might be ambiguous as applied to some objects or devices. But there would be no doubt that the statute's permitting requirement applied to all firearms, knives, and crossbows. So too here with respect to pipes, ditches, and channels.

The Industry Petitioners, but not the United States, also suggest that Sections 1314(f) and 1288(b)(2)(F) of the Act – which provide guidance for dealing with "silvicultural nonpoint sources" – indicate that the conveyances at issue here might constitute nonpoint sources. Industry Br. 22-23. But all those provisions show is that silvicultural activities can *sometimes* give rise to "nonpoint" pollution. And as the Ninth Circuit itself expressly noted, when stormwater is allowed to run off logging roads without being channeled (as happens, for example, with "outsloped" roads, *see* 2JA 99), it is not necessarily discharged from a point source. Pet. App. 11a. The same is true when such stormwater is channeled but released into low-lying areas of the forest floor, where it is allowed to percolate into the soil, instead of discharged into navigable waters. C.A. ER 54 at 107.

On the other hand, when such water "is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances," it is inescapably "a point source discharge[]." Pet. App. 11a; *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 106 (2004) (Section 1314(f) does not exempt discharges "if they *also* fall within the 'point source' definition."); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980)

(same). Nothing in Sections 1314(f) or 1288(b)(2)(F) suggests anything remotely to the contrary.

2. *Structure.* Two aspects of the CWA's structure reinforce that pipes, ditches, and channels that discharge polluted stormwater from logging roads into navigable waters are point sources.

First, another of the CWA's permitting regimes – one that requires permits for discharges of dredged or fill material – expressly exempts material from "forest roads" and "silviculture," including "harvesting for the production of . . . forest products." 33 U.S.C. § 1344(f)(1)(A), (E). Thus, when Congress wants to exempt the effects of such activity from one of the Act's permitting programs, "it knows how to do so," *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003).

Second, the CWA contains an explicit exemption from its otherwise absolute definition of "point source" in Section 1362(14). The final sentence of that section provides: "This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). The existence of that exemption precludes judicially creating another, for "[w]here Congress explicitly enumerates certain exceptions" to the general functioning of a statute, "additional exceptions are not to be implied." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *accord TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

Advancing an argument that EPA has never made and that the Government does not now support, the Industry Petitioners suggest that they might qualify for the agricultural exemption because

"silviculture is a kind of agriculture." Industry Br. 24. This is wishful thinking. The CWA repeatedly uses the word "silvicultural" to refer to something distinct from "agricultural." *See, e.g.*, 33 U.S.C. § 1288(b)(2)(F) (referencing "agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture"); *id.* § 1314(f)(A) ("agricultural and silvicultural activities"). Given that the statute sometimes refers only to "agricultural" activities and other times refers to "agricultural and silvicultural activities," this Court should presume that Congress "act[ed] intentionally and purposely in the disparate inclusion or exclusion" of the word "silvicultural," *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

3. *Legislative History.* There is no need to consult the legislative history here, for "when the text of the statute is unambiguous," "reference to legislative history is inappropriate." *HUD v. Rucker*, 535 U.S. 125, 132 (2002). At any rate, the legislative history of the CWA only underscores that pipes, ditches, and channels discharging polluted stormwater from logging roads into navigable waters are point sources. As the D.C. Circuit remarked when rebuffing EPA's attempt categorically to exempt silvicultural activities from the definition of "point source," legislators "stressed that the [CWA] was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type." *NRDC v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977). For example, Senator Jennings Randolph, Chairman of the Senate committee responsible for the Act, explained:

> I stress very strongly that Congress has become very specific on the steps it wants taken with regard to environmental protection. We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives for administrators to follow.

117 Cong. Rec. 38,805 (1971). The Act's broad yet specific definition of "point source" is emblematic of that "precise" and "definite" approach.

The Industry Petitioners nonetheless insist that "Congress expected EPA to further flesh out which discharges fall into the point and nonpoint source categories." Industry Br. 5. Noting that Senator Edmund Muskie was "the 'leading Congressional sponsor' of the Act," *id.* 5 (quoting *Costle*, 568 F.2d at 1374), they twice quote his remark that "'[g]uidance with respect to the identification of "point sources" and "nonpoint sources"' will 'be provided in regulations and guidelines of the Administrator,'" *id.* 5 (alteration in original) (quoting 117 Cong. Rec. 38,816 (1971)); *see also id.* 25 n.2. But both times, the Industry Petitioners omit what Senator Muskie said in the very next breath: "If a man-made drainage, ditch, flushing system or other such device is involved and if measurable waste results and is discharged into water, it is considered a 'point source.'" 117 Cong. Rec. 38,816 (1971). In other words, Congress recognized that EPA would resolve issues around the edges of the definition of "point source," but it insisted in no uncertain terms that the term cover all pipes, ditches, and channels.

On at least one occasion, the timber industry has recognized as much. In 1977, Continental Forest Products wrote a letter to Congress noting that logging roads sometimes use "ditches" and "culverts" for "drainage of the road surface." FWCPA Amendments of 1977, Subcomm. on Envtl. Pollution of the Comm. on the Env't and Pub. Works, Part 10 (1977) Part A at 331032. The company asked legislators to exempt such conveyances from the NPDES permitting system, asserting that "[t]o require a permit for each road, bridge, and culvert we build and maintain on our own lands would be burdensome, costly, and wasteful." *Id.* Soon thereafter, Senator Goldwater proposed amending the Act to create broad exemptions for "agriculturally *and silviculturally* related percolations, seepages, drainages, or discharges, occurring naturally or artificially induced." FWCPA Amendments of 1977, Subcomm. on Envtl. Pollution of the Comm. on the Env't and Pub. Works (June 21-23, 1977) (emphasis added).

Although Congress – as noted above – enacted a modified version of this exemption with respect to agricultural activities, it never acted on Senator Goldwater's proposal to include "silvicultural[]" activities in this exemption. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation marks omitted); *see also Russello*, 464 U.S. at 23-24 (deletion of language in earlier

version of bill presumed intentional). This presumption is conclusive here.

2. The Silvicultural Rule

Given the clarity of the statute, there is no need to consult EPA's point source regulations. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). But those regulations also plainly denote pipes, ditches, and channels draining logging roads as point sources – or, at the very least, they are ambiguous and must be so construed under *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007), in order to save them from invalidity.

a. An EPA regulation acknowledges that "surface runoff [containing pollutants] which is collected or channelled by man" constitutes a "point source" discharge. 40 C.F.R. § 122.2 (defining "discharge of a pollutant"). Another regulation, the Silvicultural Rule, provides that the regulatory term "[s]ilvicultural point source" means "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged." 40 C.F.R. § 122.27(b)(1). The Silvicultural Rule adds that the term "[s]ilvicultural point source" excludes "*non-point source* silvicultural activities such as . . . harvesting operations, surface drainage, or road construction and maintenance from which there is *natural runoff*." *Id.* (emphasis added).

Just like any statute, these regulations must, if possible, be construed to be a harmonious whole. *See, e.g., Fishgold v. Sullivan Drydock & Repair*

Corp., 328 U.S. 275, 285 (1946). The way to accomplish that is to recognize that stormwater from logging roads is a point source when it is "collected or channelled by man" 40 C.F.R. § 122.2 – that is, by man-made pipes, ditches, channels, or other discrete conveyances – and discharged into navigable waters. It is a nonpoint source when it otherwise drains or runs off of logging roads. Indeed, no other construction of the regulations is linguistically possible. Instead of excluding *all* discharges related to harvesting operations, surface drainage, and road construction and maintenance, the Silvicultural Rule excludes only "*non-point* source" runoff. *Id.* § 122.27(b) (emphasis added). Nonpoint source pollution is runoff that is not channeled in man-made conveyances at all.

It is also telling that the sentence in the Silvicultural Rule in which the reference to nonpoint sources appears refers only to "natural runoff." EPA added that term in 1980, following the D.C. Circuit's holding in *Costle* that EPA lacks the authority to exempt any silvicultural point sources from the NPDES permitting system, *see* 568 F.2d at 1382. The word "natural" means "in a state provided by nature, *without man-made changes.*" Webster's New World Dictionary 903 (3d ed. 1988) (emphasis added). Accordingly, once stormwater picks up debris generated by human activity and is channeled from logging roads through man-made pipes, ditches, and channels, it is no longer "natural runoff." *N.C.*

Shellfish Growers Ass'n v. Holly Ridge Assocs., 278 F. Supp. 2d 654, 681 (E.D.N.C. 2003).[11]

b. The Industry Petitioners assert that this analysis "renders meaningless the rule's reference to runoff from 'road construction and maintenance'" as nonpoint source activities. Industry Br. 34. This is incorrect. Road construction and maintenance are different activities than timber hauling. At any rate, road construction and maintenance will sometimes be done without the use of pipes, ditches, and channels. Some logging roads drain stormwater by way of outsloping instead of such conveyance systems. And even as to logging roads with such conveyance systems, those roads and systems – as the Industry Petitioners themselves remind this Court – have to be "built." Industry Br. 34. Until they are built and completed (or while they are being repaired and are inoperable), they do not exist and thus cannot be point sources.

Petitioners also attempt to plug the holes in their textual argument respecting the Silvicultural Rule by quoting various EPA statements from the Federal Register. *Id.* 19, 30-31; State Br. 7-8, 23-24. Some of these statements indicate that when runoff from logging roads "collect[s]" and is channeled through "ditches, pipes, and drains," these ditches, pipes, and drains are not point sources. Industry Br. 19, 31 (quoting 40 Fed. Reg. 56,932 (Dec. 5, 1975) and 41 Fed. Reg. 6282 (Feb. 12, 1976)).

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[11] One of petitioners' amici recognizes as much, contrasting "channeled" runoff from that which "flows naturally." Amicus Br. of Nat'l Governors Ass'n 7.

Even assuming that when EPA made those statements it had in mind conveyances that discharge stormwater into navigable water instead of the forest floor, those statements do not aid petitioners because EPA made them in 1975 and 1976 – *before* two important and related occurrences: (1) the D.C. Circuit's decision in 1977 that EPA lacked the authority to exempt point sources related to logging from the NPDES permitting system, *Costle*, 568 F.2d at 1382; and (2) EPA's amendment to the Silvicultural Rule in 1980 to replace the phrase "from which runoff results from precipitation events," 40 C.F.R. § 124.85 (1976), with "from which there is natural runoff," 40 C.F.R. § 122.27(b)(1). Consequently, as the United States acknowledges, EPA's pre-amendment views do not "resolve th[e] specific issue" here. U.S. Br. 30 n.12; *see also id.* 19 (stating that amended Silvicultural Rule's reference to "natural runoff" does not "clearly encompass[] . . . the sort of channeled runoff that is at issue in this case").

Nor *could* those views resolve the issue, since this Court does not consult the Federal Register to determine the *meaning* of regulations. Instead, the most agency statements in that publication can do is show whether an agency's interpretation of a regulation has remained consistent over time and thus is eligible for deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *See, e.g., Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011). Here, there are so many reasons why EPA's proposed interpretation of the Silvicultural Rule is illegitimate

that its decades-ago statements in the Federal Register cannot even accomplish that.[12]

B. The CWA's Stormwater Amendments Do Not Exempt Point Source Discharges Of Stormwater From Active-Hauling Logging Roads From The NPDES Permit Requirement.

In the 1987 Stormwater Amendments to the CWA, Congress gave EPA discretion whether to require permits for certain discharges of stormwater from "relatively de minimus [point] sources" – things such as rain gutters and similar devices at "churches, schools and residential properties." Pet. App. 37a.[13] At the same time, Congress insisted that point source discharges "associated with industrial activity" continue to be subject to the NPDES permit requirement. 33 U.S.C. § 1342(p)(2)(B), (3)(A). Contrary to petitioners' and the United States' arguments, discharges from point sources along active-hauling logging roads are "associated with industrial activity" under the plain meaning of that

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[12] If necessary, this Court should also "reconsider *Auer* in the present case," *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring), and hold that it is improper to defer under these circumstances to EPA's interpretations of the Silvicultural Rule or the Phase I regulations. *See also* Amicus Br. of Law Professors on the Propriety of Administrative Deference.

[13] Congress did not, however, altogether exempt such point sources from regulation. Unlike nonpoint sources, point source discharges of stormwater that are not now subject to the NPDES program are subject to studies conducted by EPA for possible future inclusion in the NPDES system. *See* 33 U.S.C. § 1342(p)(5)-(6).

statutory phrase and, to the extent relevant, its implementing regulations.

1. The Statute

Neither petitioners nor the United States make any effort to ascribe meaning to the CWA's term "industrial activity." Perhaps that is because performing that fundamental task exposes how incompatible their positions are with the statutory text.

When, as here, a statute does not define words, this Court "give[s] them their ordinary meaning." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). The ordinary meaning of "industrial" is "of, connected with, or resulting from industries." Webster's New World Dictionary, *supra*, at 689. The dictionary defines "industry," in turn, as "any particular branch of productive, esp. manufacturing, enterprise" or "any large-scale business activity." *Id.* at 690.

Plainly, this definition encompasses the sort of mechanized timber cutting and hauling operations that petitioners use logging roads to conduct. As elaborated above, such operations involve assemblages of multi-ton machinery (which operate with powerful internal combustion engines) felling and dragging trees. *See supra* at 4-5 (describing this process and including links to videos and photos). Other heavy equipment strips the trees of their branches and loads them onto massive logging trucks. *Id.* Those fully loaded trucks then haul away the companies' raw material to be milled or shipped elsewhere. *Id.* This work occurs on massive scales;

timber contracts typically contemplate harvesting several hundreds of acres of land at a time.

In fact, when petitioners are in non-litigation mode, they openly embrace their work as industrial. Georgia-Pacific's website explains that it operates within the "forest products industry"[14]; the American Forest & Paper Association has a website called "our industry"[15]; and the very name of the Oregon Forest *Industries* Council tells this Court all it needs to know.

It is immaterial that the work that occurs on logging roads is "in the field," so to speak, as opposed to at a mill or factory. As EPA itself has recognized, the word "industrial" covers various field work, such as mining and construction activities, as well as landfill operations. 40 C.F.R. § 122.26(b)(14)(iii), (v), (x); *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 307 (1981) (Powell, J., concurring) (surface mining is "a major industrial activity"). The import of the word – as legislators themselves indicated – is to distinguish large-scale business activity from "churches, schools, [and] residential property," 131 Cong. Rec. 19,850 (1985) (Rep. Rowland), not land-based operations from those occurring inside factories. And the logging operations at issue here are obviously large-scale, mechanized business activity.

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[14] Georgia-Pacific, Careers, http://www.gp.com/careers/company/index.html (last visited Oct. 12, 2012).

[15] Am. Forest & Paper Ass'n, Our Industry – Forestry, http://tinyurl.com/NEDC3-7 (last visited Oct. 12, 2012).

2. Phase I Regulations

As with the CWA's definition of "point source," there is no need, given the clarity of the statute, to consult EPA's regulations implementing the Stormwater Amendments. *See Chevron*, 467 U.S. at 842-43. But those regulations equally plainly require permits for discharges from pipes, ditches, and channels that collect stormwater from active-hauling logging roads and discharge it into navigable waters. At the very least, the regulations are ambiguous and EPA's contrary suggestions are not entitled to deference. *See Christopher*, 132 S. Ct. at 2166; *Talk Am.*, 131 S. Ct. at 2266 (Scalia J., concurring); *Duke Energy*, 549 U.S. at 573.

a. EPA's regulations plainly classify the discharges here as "associated with industrial activity." Those regulations provide that "[f]acilities classified as Standard Industrial Classification[] [SIC] 24" "are considered to be engaging in 'industrial activity.'" 40 C.F.R. § 122.26(b)(14) & (b)(14)(ii). SIC 24, in turn, includes "logging," defined as a class of "[e]stablishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials." 2JA 64 (quoting "Industry number 2411"); *see also* 2JA 53; 2JA 50 (EPA Report: "[i]ndustrial activities include . . . loading and unloading of logs onto trucks or railroad cars for transport"). And for any "categor[y] of industry identified in [EPA's regulations]," the phrase "*associated with* industrial activity" encompasses sites used for "loading and unloading, transportation, or conveyance of any raw material." 40 C.F.R. § 122.26(b)(14) (emphasis added). That describes active-hauling logging roads exactly.

b. The Government disputes this analysis on the ground that SIC 2411 uses the word "establishments" to describe the things it covers. U.S. Br. 25. But that nomenclature is of no moment. SIC 24 uses that term throughout its classifications simply to mean "industries" or "businesses." 2JA 64-69. What is more, EPA itself recognizes elsewhere that other activity in open space, such as mining, construction, and landfills, is industrial. *See* 40 C.F.R. § 122.26(b)(14)(iii) (mining); 73 Fed. Reg. 56,572 (Sept. 29, 2008) (mining); 40 C.F.R. § 122.26(b)(14)(x) (construction); *id.* § (14)(v) (landfills). The Government offers no reason why logging activity would uniquely have to occur inside a factory or mill to be industrial.

The only other argument that the Government advances in urging this Court to disregard the plain import of EPA's regulations is that, in referencing SIC 2411, "EPA *intended* to reference only . . . rock crushing, gravel washing, log sorting, and log storage." U.S. Br. 25 (emphasis added) (internal quotation marks omitted). Even taking the Government's assertion of intent at face value, *but see Talk Am.*, 131 S. Ct. at 2266 (Scalia J., concurring), it is improper for this Court to "[go] behind the plain language" of a regulation "in search of a possibly contrary . . . intent." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982). When an agency's interpretation is "inconsistent with the regulation" as written, it is not eligible for deference. *Auer*, 519 U.S. at 461 (internal quotation marks omitted). And here, the regulations expressly classify SIC 24 as "industrial activity"; SIC 24 includes "logging"; and "logging" includes "cutting timber" and producing

"wood raw materials." That is unambiguously the end of the matter.

c. Perhaps sensing the weakness of EPA's position, petitioners offer no fewer than four other arguments for avoiding the straightforward meaning of the stormwater regulations. But none of these industry arguments is eligible for deference because none comes from EPA. *See Auer*, 519 U.S. at 461. At any rate, each argument conflicts with the plain language of the Phase I rule's categorization of logging as industrial activity.

First, the Industry Petitioners contend that logging does not fall within EPA's general definition of "industrial activity." Industry Br. 38. That definition describes industrial activity as "manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). But this general definition does not override the regulation's specific statement that facilities classified under SIC 24 "are considered to be engaging in 'industrial activity,'" 40 C.F.R. § 122.26(b)(14). *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (specific provisions govern more general ones). At any rate, the general definition encompasses "manufacturing," and the federal government categorizes "logging" as a "manufacturing" business. 2JA 53 & 64.

If petitioners mean to suggest that the phrase "at an industrial plant" limits the scope of manufacturing activities that EPA's general definition covers, then petitioners are ignoring the "commonsense principle of grammar" known as the last-antecedent rule. Antonin Scalia & Bryan A. Garner, Reading Law 144 (2012); *see also Barnhart*

v. Thomas, 540 U.S. 20, 27-28 (2003). The phrase "at an industrial plant" refers only to "raw materials storage," not to "manufacturing or processing." Otherwise, EPA's own inclusion of construction and mining activities in the field, as well as landfills and open dumps, *see* 40 C.F.R. § 122.26(b)(14)(iii), (v), (x), would make no sense.

Second, noting that the Phase I rule states that "*facilities* classified as SIC 24" are engaging in industrial activity, the Industry Petitioners argue that logging sites are not "facilities" because they are not – in the words of a dictionary definition of the term – "built" or "constructed" or "installed." Industry Br. 39 (emphasis added) (quoting 40 C.F.R. § 122.26(b)(14)). This is a curious claim; "logging roads" and their stormwater drainage systems – like other transportation and utility devices – are, in fact, built, constructed, and installed. *Cf.* 23 U.S.C. § 166 (calling HOV lanes on highways "facilities"); 33 U.S.C. § 1362(24) (oil and gas "facilities" include "field activities"); 28 C.F.R. § 36.104 (deeming "roads" to be "facilities" under the Americans with Disabilities Act); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 283 (1958) (calling power lines "facilities"); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 392, 410-11 (1912) (describing railroad bridges and switching yards as "facilities").

At any rate, dictionary definitions are immaterial when the law itself defines a term. *See, e.g.*, *Fox v. Standard Oil Co.*, 294 U.S. 87, 95 (1935). And here, EPA's regulations define "facility" as "any NPDES 'point source' or any other . . . activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program." 40

C.F.R. § 122.2; *see also id.* § 122.26(b)(14)(iii) (using the word "[f]acilities" to describe mining sites). For the reasons described above, logging roads qualify as facilities because pipes, ditches, and channels are point sources that are subject to regulation under the NPDES program. *See supra* at 31-42.

Third, the Industry Petitioners contend that logging roads are not associated with industrial activity because "they are not 'immediate access roads' within the meaning of [40 C.F.R. § 122.26(b)(14)]." Industry Br. 40. The Industry Petitioners are mistaken on multiple levels. As an initial matter, the relevant sentence in that regulation reads: "For the categories of industries identified in this section, the term *includes, but is not limited to*, . . . immediate access roads" and other facilities. 40 C.F.R. § 122.26(b)(14) (emphasis added). In other words, the facilities mentioned in the latter part of the sentence do not constitute an "exhaustive" list of industrial sites. Scalia & Garner, *supra*, at 132 (citing cases). It is thus irrelevant whether the logging roads here qualify as "immediate access roads."

In any event, the roads here *are* immediate access roads. The preamble to EPA's Phase I regulations notes that "immediate access roads" means "roads which are exclusively or primarily dedicated for use by the industrial facility." 55 Fed. Reg. 48,009 (Nov. 16, 1990). The Industry Petitioners contend that logging roads are not used "primarily" for logging because they are also used for "recreational" and other purposes. Industry Br. 41. But as the Ninth Circuit observed, "[l]ogging is [] the

roads' *sine qua non:* If there were no logging, there would be no logging roads." Pet. App. 40a.

Even if some logging roads could be characterized as used primarily for recreational activity, petitioners and the Government ignore the fact that this case involves only certain specified logging roads that are the sole designated access and haul routes for active logging operations. C.A. ER 47 at 98-99. These roads are located in a forest managed year-round for timber production and are essential for the mechanized timber cutting, loading, and hauling that is taking place there. Indeed, petitioners themselves are obligated by contract to use and maintain these roads for those precise purposes. 2JA 7-8, 19-20; C.A. ER 47 at 98-99. Surely the primary use of at least *these* roads is logging.

Fourth, petitioners assert that the Phase I regulations exclude logging because they provide that they do not apply to "facilities or activities excluded from the NPDES program under [the Silvicultural Rule]." Industry Br. 38 (quoting 40 C.F.R. § 122.26(b)(14)); *see also id.* 40. Because the Silvicultural Rule itself does not exclude the discharges at issue here from the NPDES program, *see supra* at 38-42, this reference to it cannot do so either.

C. None Of Petitioners' Policy Arguments Warrants Disregarding The CWA's Permitting System In This Context.

The plain import of the statutory provisions here makes perfect sense in light of the CWA's overall purpose and operation. That purpose – as Congress enshrined in the statute itself – is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "[T]he word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (quoting H.R. Rep. No. 92-911, at 76 (1972)). Accordingly, the Act targets a wide range of "preventable causes of water pollution" – namely, identifiable point sources. *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). Among other things, the Act requires permits for channeled discharges from mining and construction sites, as well as for sewer systems that drain stormwater from municipal roads and state highway systems. 33 U.S.C. § 1342(p)(3); 40 C.F.R. §§ 122.26(b)(14)(iii) (mining), 122.26(a)(3)(i) (municipal sewers), 122.26(b)(14)(x) (construction), 122.28(a)(1)(iv) (state highways).

Regulating channeled discharges from active-hauling logging roads is an essential component of this regime. Such discharges are a leading source of water quality impairment to rivers and streams nationwide. 2JA 15 (citing Environmental Protection Agency, *2000 National Water Quality Inventory* 14 (Figure 2-5)). The sediment that logging roads deliver not only changes the structure of riverbeds

and the temperature of streams, but also "adversely affects fish – in particular, salmon and trout – by smothering eggs, reducing oxygen levels, interfering with feeding, and burying insects that provide food." Pet. App. 4a; *see also* Amicus Br. of W. Div. of the Am. Fisheries Soc'y. There is consequently every reason to bring such discharges – when they are channeled by man and thus can be pinpointed – within the purview of the NPDES permitting system, instead of merely leaving them to states' "best management practices." *See generally* Amicus Br. of Northwest Environmental Advocates (detailing shortcomings in states' nonpoint source programs).

Petitioners nevertheless object that subjecting the discharges at issue here to the NPDES permitting system would be costly and unnecessary. Industry Br. 43-50; State Br. 23-27. They also contend that subjecting these discharges to federal permitting requirements would upend years of settled practice of complying only with state regulations. Industry Br. 43-50; State Br. 23-27. Neither of these objections warrants deviating from Congress's clear statutory design.

1. The burden petitioners claim they would encounter by complying with the NPDES permitting system provides no reason for this Court to create a judicial exemption to that system.

a. Compliance with environmental laws can be nettlesome and sometimes expensive. But this Court has explained time and again that "[w]hether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed

judges," nor by federal agencies "in contradiction of congressional direction." *Rapanos v. United States*, 547 U.S. 715, 752-53 (2006) (plurality opinion) (internal quotation marks and citation omitted); *see also Massachusetts v. EPA*, 549 U.S. 497, 529-30 (2007) (even though EPA asserted that regulating carbon dioxide emissions would be burdensome, the Clean Air Act required it to do so because it required regulation of "any" air pollutant, and the definition of "pollutant" embraced carbon dioxide); *TVA v. Hill*, 437 U.S. 153, 184, 188 (1978) (rejecting argument that enforcing the Endangered Species Act according to its "plain intent" would be too costly; this Court "emphatically" lacks "the power to engage in such a [cost/benefit] weighing process").[16] If petitioners wish to argue that it is unnecessarily costly and difficult for them to obtain NPDES permits, they should make those arguments to Congress, not to this Court.

b. In any event, petitioners' suggestions of doom are, to say the least, overblown.

i. At the outset, it is important to reiterate that the vast majority of logging roads do not generate

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[16] Of course, this Court has made essentially the same point with respect to statutory interpretation more generally. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("[This Court] possess[es] neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them."); *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66, 76-77 (1999) (refusing to consider defendant's "concerns about the financial burden" that federal statute imposed because the Court's role is simply "to interpret existing law").

point source discharges. Some logging roads are "outsloped" instead of crowned, allowing stormwater to drain downhill without collecting in any man-made channels. 2JA 99. And even when logging roads are crowned and have stormwater collection and channeling systems, most such systems disperse the stormwater they collect onto the forest floor, where it can percolate into the ground and leave suspended sediments behind. 2JA 15; C.A. ER 54 at 107. In the areas at issue here, only about 25% of the stormwater from logging roads is collected and discharged by man-made conveyances into navigable waters. 2JA 15. Furthermore, only a fraction of those roads are host to active timber cutting and hauling at any given time.

ii. As to *those* portions of *those* roads, the D.C. Circuit has correctly noted that "[t]he existence of a variety of options" for regulating silvicultural point sources "belies EPA's infeasibility arguments." *Costle*, 568 F.2d at 1381. Three options bear mentioning.

First, permitting authorities can issue permits covering entire regimes, including expansive road networks. Noting that "[a]rea-wide regulation is one well-established means of coping with administrative exigency," the D.C. Circuit explained that the CWA allows a permitting authority to issue a "general" permit "to a *class* of point source dischargers, subject to notice and opportunity for public hearing in the geographical area covered by the permit." *Id.* at 1381 (emphasis added); *see also* 40 C.F.R. §§ 122.28, 123.25. This procedure not only eases administrative strain, but also allows states and their political subdivisions to tailor permit requirements to regional

conditions. For instance, EPA has issued a general permit covering *all* small-scale construction sites within its jurisdiction across the country. *See* Final [NPDES] General Permit for Stormwater Discharges from Construction Activities, 77 Fed. Reg. 12,286 (Feb. 29, 2012). Similarly, the Oregon Department of Environmental Quality has issued a single permit to the Oregon Department of Transportation that covers every point source that drains stormwater on the state highway system.[17] There is no reason why a similar approach could not be used here. *See* Amicus Br. of Robert Wayland and Other Former Senior State and Federal EPA Officials; Amicus Br. of Environmental Protection Information Ctr.

Second, EPA can impose "alternative permit conditions" other than the CWA's default of complying with prescribed effluent limitations. *Costle*, 568 F.2d at 1379-80. Under Section 1342(a), EPA (or its state delegates) may issue permits contingent upon (A) compliance with established effluent limitations *or* (B) "such conditions as the Administrator determines are necessary to carry out the provisions of this chapter." 33 U.S.C. § 1342(a). The latter subsection "gives EPA considerable flexibility in framing the permit to achieve the desired reduction in pollutant discharges." *Costle*, 568 F.2d at 1380. Indeed, "[i]t may be appropriate in certain circumstances for EPA to require a permittee simply to monitor and report effluent levels; EPA

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[17] *See* Stormwater Outfall Inventory Management, Or. Dep't of Transp., http://tinyurl.com/NEDC4-6 (last visited Oct. 12, 2012) (discussing this permit).

manifestly has this authority." *Id.* (footnote and citation omitted).

Third, the CWA allows variances for economic hardship. In particular, permitting authorities need not require owners or operators of point sources to satisfy prescribed effluent levels if the owners/operators show that they will use "the maximum use of technology within the[ir] economic capability" and that their actions "will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. § 1311(c); *see also Costle*, 568 F.2d at 1379. Thus, while "the Act insist[s] that a permit is necessary" for point sources along logging roads that discharge pollutants into navigable waters, permitting authorities have "necessary flexibility in the shaping of permits that is not inconsistent with the clear terms of the Act." *Costle*, 568 F.2d at 1382.

2. Little need be said respecting petitioners' suggestions that they have some sort of vested interest in their failures thus far to obtain NPDES permits. This Court has rejected such arguments before. In *Rapanos*, the Army Corps of Engineers urged this Court to consider the fact that it had regulated wetlands in a certain manner for thirty years. This Court dismissed the suggestion out of hand: "Surely this is a novel principle of administrative law – a sort of 30-year adverse possession that insulates disregard of statutory text from judicial review. It deservedly has no precedent in our jurisprudence." 547 U.S. at 752 (plurality opinion). Similarly, a municipality recently maintained that losing a case would require governmental and corporate employers to revisit

"practices they have used regularly for years." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010). This Court unanimously brushed aside this assertion, explaining that "it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted. . . . If that effect was unintended, it is a problem for Congress, not one that federal courts can fix." *Id.*

The CWA, in short, "is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all." *Costle*, 568 F.2d at 1380; *see also* Pet. App. 43a-45a. It affords regulators and companies considerable flexibility, but it does not allow them to ignore point sources that pollute our nation's waterways. This Court should enforce the law as written and allow policymakers, if they so choose, to react accordingly.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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In the Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Like the Ninth Circuit, respondent seems to think it is writing on a blank page. But this Court has long recognized that an agency's interpretations of ambiguous statutes and its own regulations are entitled to deference. This is the kind of case for which such deference was intended: the CWA and its implementing regulations are dauntingly complex and address highly technical subject matter that demands expert agency judgment. The regulations at issue, and EPA's contemporaneous interpretations of them, are thoroughly reasoned, long-standing exercises of judgment that are entitled to deference.

The CWA provides for NPDES permitting of some, but not all, channeled stormwater discharges and state regulation of all others. EPA has maintained for 35 years that forest road and most other silvicultural runoff does not fall under the NPDES program and that, regardless of whether "nonpoint runoff from precipitation" is channeled by "ditches," it "is more effectively controlled by the use of planning and management techniques." 41 Fed. Reg. 6282. Independent forestry experts agree. See Amicus Br. of Society of American Foresters.

Remarkably, respondent fails to acknowledge the States' role under the CWA to address stormwater runoff through best management practices. It ignores that states closely regulate logging and forest roads to minimize sediment discharge, as 32 States have explained. States take these responsibilities seriously, as do petitioners. *E.g.*, http://tinyurl.com/ForestProtLaws; OSU, MANAGING WOODLAND ROADS: A FIELD HANDBOOK (2007). BMPs are part of every timber purchaser's contract with the State, enforced by inspectors with authority to shut down logging, and backed by the threat of monetary sanctions for

violations. *E.g.*, http://tinyurl.com/KlahnberryContract §§ 19, 29, 34, 39, 53-54, 60. Ditches and culverts are BMPs on many roads because they reduce sediment discharge and preserve fish passage. Implementing state BMPs should not become the occasion for federalizing control of precipitation runoff that Congress and EPA meant to leave to the States.

Because Congress's 1987 Amendments comprehensively address stormwater discharges, respondent's claims ultimately rest on its contentions that tree harvesting and hauling are unambiguously "industrial activity," or "associated with" it; and that EPA—though EPA has always insisted to the contrary (*e.g.*, Pet. App. 86a-87a & n.5)—in fact labeled those activities "industrial" in its Phase I regulations. It is with these easily refuted assertions, which turn *Chevron* and *Auer* on their heads, that we begin. As the United States explains (at 27, 32), Congress gave EPA "significant discretion" to define what counts as "industrial activity" and what has a "sufficiently close nexus" to be "associated" with it.

A. Channeled forest road runoff is not a discharge "associated with industrial activity."

When Congress fundamentally revamped the treatment of stormwater in 1987, it required permits only for certain narrow categories of stormwater discharges, the contours of which EPA has broad latitude to define. The issue in this case therefore is whether EPA has declared forest road discharges to be among the few types of stormwater discharges that need permits. It has not.

Contrary to respondent's argument (at 43-50), the statutory phrase "associated with industrial ac-

tivity" leaves EPA with substantial discretion. EPA's Phase I regulation is a paradigm example of the kind of agency interpretation that is entitled to *Chevron* deference, and it plainly excludes channeled forest road runoff from the NPDES requirement. Even if the regulation were unclear, EPA's consistent interpretation of it is entitled to *Auer* deference.

1. Respondent claims that timber harvesting is an "industrial activity" within the plain-text meaning of the Act and regulation, and that timber hauling is either part of or "associated" with this industrial activity. It points to a dictionary definition of "industry" and the regulation's reference to SIC 24. Neither argument is persuasive.

a. Respondent says (at 43-44) that "industry" means "productive, esp. manufacturing, enterprise or any large-scale business activity." Observing that petitioners refer to the "forest products industry" (in contexts that include saw and pulp milling and paper and wood manufacturing), respondent asserts that this definition encompasses "mechanized timber cutting and hauling."

That approach proves too much. Many banks engage in "large-scale business activity," and lawmakers and courts often refer to the "financial services industry." *E.g.*, 12 U.S.C. § 4708(a). That does not make banking "industrial activity" within the meaning of Section 1342(p)(2)(B) or Part 122.26(a).

What is more, the dictionary that respondent cites "distinguishe[s]" "industry" from "agriculture." WEBSTER'S NEW WORLD DICTIONARY 690 (3d ed. 1988). See *Tigner* v. *Texas*, 310 U.S. 141, 146 (1940) ("the differences between agriculture and industry call for differentiation in the formulation of pub-

lic policy"). The use of a chain saw, feller-buncher, or cable-yarder to harvest trees no more makes logging "industrial" than using a 20-ton combine to pick and separate corn makes crop harvesting "industrial." And EPA has determined that "[f]orestry roads and silvicultural harvesting * * * more closely resemble agricultural land uses than industrial ones." Pet. App. 124a n.19. On that basis, the dictionary definition does *not* cover timber harvesting. That there are "alternative dictionary definitions" that "mak[e] some sense under the statute" suggests "that the statute is open to interpretation." *Nat'l R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 418 (1992).[1]

b. Given ambiguity in the meaning of "industry," respondent does not seriously contend that EPA lacks authority to define "industrial activity." Instead, respondent argues that timber harvesting is "industrial activity" within the meaning of EPA's regulation itself. That is also incorrect.

Respondent admits (at 45) that under the Phase I regulation only "industrial *facilities*" (including "*fa-*

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[1] There is no statutory support for the Ninth Circuit's *ipse dixit* that Phase I covers all but "de minimus sources" of stormwater. In support of its contention (at 44) that industrial activity excludes only "'churches, schools, [and] residential property,'" respondent cites a snippet from one Member of Congress, who in fact urged that "EPA must have the statutory authority to inject some reason back into" stormwater permitting, after "court decisions" departed from "the intent of Congress" by requiring "extensive permitting." 131 Cong. Rec. 19850. In the same debate, another Congressman said EPA would "identify" those "classes and categories" of stormwater "discharges from industrial sites" that are "required to apply for a permit." *Id.* at 19847 (statement of Rep. Roe).

cilities classified as [SIC] 24") are "considered to be engaged in 'industrial activity'" (40 C.F.R. § 122.26-(b)(14)(ii)); and that only "*establishments* primarily engaged" in various "logging" activities fall under SIC 24 (2JA 64) (emphases added). Thus, EPA specified in promulgating the Phase I rule that industrial stormwater means "storm water discharges from facilities" or "[e]stablishments identified under SIC 24" —that is, establishments "engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials." 55 Fed. Reg. 48007-48008. This definition does not include discharges from sites other than industrial *facilities* or *establishments* of that type. That is also why the rule describes its coverage in terms of various activities "at an industrial plant" and on "industrial plant yards." 40 C.F.R. § 122.26(b)(14).

Accordingly, EPA's shorthand reference to SIC 24 was intended to reach traditional industrial sources like mills—as the United States points out (at 24-26)—but not transitory harvesting, which does not occur at an "establishment." EPA's reading comports with the SIC Manual's definition. 2JA 57 ("establishment" is "an economic unit, generally at a single physical location"). It is consistent with the dictionary definition of "establishment" as "a more or less fixed" "place of business." WEBSTER'S THIRD NEW INT'L DICTIONARY 778 (1993). And it encompasses fixed mining, construction, and landfill sites while excluding timber cutting, which is "a transitory operation which may occur on a site for only 2-3 weeks once in a 20-30 year period." 55 Fed. Reg. 48011. The government reasonably explains (at 25 & n.9) that by including SIC 2411 within the reference, EPA sought only to capture the four silvicultural point sources defined in the Silvicultural Rule. EPA has discretion

to determine what its reference to SIC 24 means, and from the time EPA promulgated the rule it did not reach timber harvesting.

Nor does this case involve "facilities." Pet. Br. 39. Respondent now contends that "logging roads" are *themselves* facilities. But that approach cannot be reconciled with the rule's description of "immediate access roads" as "directly related to" facilities (40 C.F.R. § 122.26(b)(14)), or with EPA's explanation that "immediate access roads" are "dedicated for use by the industrial facility." 55 Fed. Reg. 48009.

Respondent argues (at 48) that Part 122.2 *defines* "facility" to include any activity "that is subject to regulation under the NPDES program." But that language *qualifies* rather than defines "facility." See 40 C.F.R. § 122.2 ("[f]acility or activity" means one that is "subject to regulation under the NPDES program"). And that qualification sheds no light on the issue presented here, as shown by respondent's circular logic: Forest roads are subject to regulation because they are "facilities," and they are "facilities" because they are subject to regulation. In the end, respondent never disputes that transitory logging sites are *not* "facilities" within the ordinary meaning of the word.

2. Respondent alternatively claims (at 49-50) that forest roads are covered by the Phase I rule because they are "associated with" logging sites. That, too, is wrong, for two independent reasons. First, we have explained, timber harvesting is not "industrial activity" under the rule. Second, the roads at issue are not "associated with" timber cutting in the sense that EPA understands that term. "Association" is a concept of degree, and EPA as the expert agency gets to decide what degree is sufficient.

Forest roads are not "immediate access roads" associated with industrial activity because they are not "within" or "at facilities." 55 Fed. Reg. 48009; Pet. Br. 40-41. Even if logging sites were industrial "facilities," the roads at issue are not "within" or "at" those sites.[2] Respondent argues instead that logging is the "sine qua non" and "primary use" of some logging roads. But the standard articulated by EPA is different: roads "dedicated for use by the industrial facility" and *not* "public access roads." 55 Fed. Reg. 48009. Neither the Sam Downs nor Trask River Roads—public roads built more than 50 years ago and used intermittently to transport logs but constantly by State foresters, fishermen, hunters, campers, OHV enthusiasts and countless recreational and other users—fit into that category. See http://tinyurl.com/TillamookRecGuide. Indeed, one discharge site alleged by respondent features a school bus pullover.

Respondent also argues (at 45) that logging roads are "associated with" industrial activity because they are "sites used for 'loading and unloading, transportation, or conveyance of any raw material.'" But even the Ninth Circuit did not so conclude, for good reason: respondent's expansive reading would swallow the entire U.S. road system. The Phase I regulation sensibly limits "material handling sites" (where "storage, loading and unloading, transportation, or conveyance of any raw material" take place) to those "at

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[2] Respondent claims (at 49) that it is "irrelevant" whether the logging roads here are "immediate access roads" because the list in which that phrase appears is not "exhaustive." But regardless of what *other* objects may fall within the definition, the *roads* EPA considered associated with industrial activity are *immediate access roads*.

an industrial plant," and excludes even "plant lands separate from the plant's industrial activities." 40 C.F.R. § 122.26(b)(14); see 60 Fed. Reg. 50835-50836.

3. Finally, there is the Phase I regulation's reference to the Silvicultural Rule. The regulation says in plain terms that "discharges from facilities or activities excluded from the NPDES program under this part 122," which includes the Silvicultural Rule, are not "associated with industrial activity." 40 C.F.R. § 122.26(b)(14). That sentence, which EPA included for the express purposes of excluding transitory logging operations from the definition of "industrial activity" (55 Fed. Reg. 48011), is alone enough to require reversal.

Respondent ignores this issue. In its view (at 50), "[b]ecause the Silvicultural Rule itself does not exclude the discharges at issue here," EPA's "reference" to the Rule in the Phase I regulation "cannot do so either." That is incorrect.

We demonstrate below why respondent's interpretation of the Silvicultural Rule is mistaken. But even if respondent were correct that the Rule is effectively invalid, it would make no difference for purposes of interpreting the Phase I rule. The question with respect to *that* regulation is whether EPA had authority under the 1987 amendments to exclude those discharges that EPA at the time interpreted the Silvicultural Rule to cover. It did. The Ninth Circuit's later invalidation of the Silvicultural Rule has no bearing on that conclusion. The government offered this same reading of the Phase I regulation's reference to the Silvicultural Rule in a 2003 brief (Pet. App. 86a-87a), repeated it below (1JA 42 n.10), and maintains it here (U.S. Br. 25 n.9). Respondent still has no answer.

4. Any doubt about these issues would be resolved by *Auer* deference to EPA's consistent interpretation of its Phase I regulation. See Pet. Br. 41-43; Pet. App. 124a ("forestry roads" are not "'directly related' to activities associated with an 'industrial plant' under any plain language reading of the regulation"); 60 Fed. Reg. 50835 (explaining, in preamble to the Multi-Sector General Permit for Industrial Activities, "EPA's determination" that "harvesting activities," including "felling, skidding, preparation (e.g., delimbing and trimming), [and] loading and initial transport of forest products from an active harvest site" are "not required to be covered under [NPDES] storm water permits").

EPA's interpretation of its "own regulations" is "controlling unless plainly erroneous or inconsistent with the regulation" (*Auer*, 519 U.S. at 461), or if it does not reflect its "fair and considered judgment," "conflicts with a prior interpretation," or is but "a convenient litigating position." *Christopher*, 132 S. Ct. at 2166; see *Talk Am.*, 131 S. Ct. at 2260-2261. A "reasonable" agency interpretation has "controlling weight." *Thomas Jefferson Univ.*, 512 U.S. at 515. No exception to *Auer* deference applies here, and respondent's supposedly "better" reading of EPA's regulation is beside the point. Pet. Br. 35-37; Law Prof. Br. Supporting Pet. 20-32.

B. Channeled forest road runoff is not a "point source" discharge.

1. In arguing (at 31-38) that the Ninth Circuit's interpretation of the CWA's "point source" definition is the *better* one, respondent misses the point: EPA's long-standing interpretation of the CWA fills a gap in the statute, is rational, and accordingly is entitled

to *Chevron* deference. The Ninth Circuit erred in substituting its view for EPA's.

a. Respondent asserts that the statute is "straightforward" because it defines "point source" to include "*any* pipe, ditch, [or] channel," and the word *any* "means *all*." Br. 31-32 (emphasis added). In respondent's view, *all* "pipes, ditches, and channels" are categorically "point sources," and *all* water that "is collected, channeled, and discharged through" such conveyances "is inescapably a point source discharge." Br. 32-33.

But that is self-evidently wrong. As respondent acknowledges (at 34), "the CWA contains an explicit exemption" from the definition of point source, which, by the statute's own terms (33 U.S.C. § 1362(14)), "does not include agricultural stormwater discharges." Accordingly, *some* discharges from ditches and channels are *not* from point sources. So much for "any" meaning "all."

Beyond that, under respondent's interpretation virtually all runoff would become "point source" as it leaves graded surfaces and erodes channels. But that interpretation would eliminate the CWA's careful differentiation between point source discharges from "discernible, confined, and discrete" sources best regulated through effluent limitations and nonpoint source discharges best regulated through BMPs. That too suggests the term is subject to interpretation, as every court to consider the matter has held. See Pet. Br. 21.

Against this backdrop, the definition of "point source" is ambiguous as it concerns forest road runoff. That follows from the CWA's language, including the words "discrete" and "by any person" (Pet. Br. 19-

25) and from its structure (*id.* at 25-30). And EPA's Silvicultural Rule, which interprets "point source" as *not* covering such runoff, is a reasonable interpretation entitled to *Chevron* deference.

b. Respondent objects (at 32-33) to our and the government's reliance on the ambiguity of the term "discrete," contending that when a statute lists "generic requirements" (point sources must be "discrete") followed by "expressly listed" examples that satisfy the requirements ("ditches"), the "generic requirements" become "immaterial as applied to" the examples listed. Respondent's own example proves that is not so. A statute regulating all "deadly weapons" could not sensibly be read to cover *plastic toy* crossbows simply because it "expressly lists" a "crossbow" as a general example of a "deadly weapon." So the word "deadly" would continue to limit even items expressly listed. Just so here, concerning the word "discrete." And respondent does not disagree that channeled silvicultural stormwater has no discrete source.

c. Responding to our contention (at 24) that silviculture is a kind of agriculture falling within the agricultural stormwater exception, respondent notes (at 35) that when Congress enacted the CWA 15 years before it enacted that exception, it used "agriculture" and "silviculture" conjunctively. Thus, according to respondent, Congress must have acted intentionally when it omitted the word "silviculture" from the agricultural exception. That is wrong for three reasons.

First, the "negative implications" that may be drawn from the disparate inclusion and exclusion of a word from different statutory provisions are strongest when "the relevant statutory provisions

were considered simultaneously"; they are limited when, as here, "the two relevant provisions were not considered or enacted together." *Gomez-Perez* v. *Potter*, 553 U.S. 474, 486 (2008).

Second, those implications are most persuasive when the provision omitting the relevant word "tracks the language and structure" of the provision including it. *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 434 (2002). They are "undermined" when the relevant provisions address different issues in "different terms" and are "not modeled after" one another. *Gomez-Perez*, 553 U.S. at 486-487. That is the case here: 33 U.S.C. §§ 1288(b)(2)(F) and 1314(f)(2) address different issues and are drafted with different grammatical and syntactical structures bearing little resemblance to Section 1362(14). That is even more clearly the case with respect to 33 U.S.C. § 1344(f)(1). See Resp. Br. 34. Section 404 addresses fill, and "EPA's function is different, in regulating fill, from its function in regulating other pollutants." *Coeur Alaska* v. *Se. Alaska Conservation Council*, 557 U.S. 261, 274 (2009). And unlike Section 402, Section 404 unambiguously would require a permit without the express exemption.

Finally, the disparate inclusion-omission rule is but one example of the general canon that a phrase must be read within its broader statutory context. It is trumped when it produces a result "contrary" to Congress's overall "purpose" reflected in "the broader context of the statute as a whole." *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398-1399 (2011). In a situation like that, "[t]he omission of [certain] language from" one statutory provision and its inclusion in another is best understood as "reflect[ing] Congress' belief

that [the word] was unnecessary" in the other. *Id.* at 1400 n.7.

That describes this case exactly. We gave a number of reasons why the CWA's structure made it unnecessary for Congress separately to include the word "silviculture" as part of the broader agricultural exemption (Pet. Br. 23-28); each one has gone unanswered.

We explained (at 31-32) that if Congress wanted to abolish the Silvicultural Rule, it could have said so as part of the 1987 stormwater amendments, or earlier.[3] Instead, it inserted the agricultural exception and otherwise left it to EPA to determine which stormwater discharges should be regulated as "associated with industrial activity." In a situation like that, "congressional failure" to "repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Bell Aerospace*, 416 U.S. at 275.

We explained, too (at 26-27), that the "conceptual differentiation" between "the pollution control mechanisms available for point and nonpoint sources" is reflected in the CWA's bifurcated federal-state regulatory scheme. That structure suggests Congress intended forest road runoff—which is "not susceptible"

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[3] EPA early on promulgated regulations subjecting irrigation return flows to NPDES permitting. 41 Fed. Reg. 28493 (July 12, 1976). Congress quickly overturned that rule. Pub. L. No. 95-217, § 33, 91 Stat. 1566, 1577 (1977). Though the same regulation referenced the Silvicultural Rule, Congress left that Rule undisturbed. Congress's rejection of a proposed CWA amendment exempting "silviculturally related" discharges from permitting (relied on by respondent, at 37) is likewise consistent with Congress's satisfaction with the Silvicultural Rule.

to regulation by "effluent limitations" (40 Fed. Reg. 56932)—to be regulated by States as nonpoint source discharges. That is especially apparent because respondent's contrary reading would create a catch-22. Ditch-and-culvert systems are common BMPs to address *non*-channeled forest road runoff. According to respondent, implementation of state BMPs to regulate avowedly *non*point source runoff would transform the runoff into a point source discharge subject to *federal* regulation. This "expansive interpretation would 'result in a significant impingement of the States' traditional and primary power over land and water use.'" *Rapanos* v. *United States*, 547 U.S. 715, 737-738 (2006) (plurality). Congress could not have intended such a result. Indeed, when Congress revised the treatment of stormwater in 1987, it was to ensure that most channeled stormwater would *not* trigger a permit requirement.

2.a. Respondent contends (at 38) that the Silvicultural Rule denotes ditches "draining logging roads as point sources." The rule, however, unambiguously states otherwise. It provides an exclusive list of four silvicultural point sources: "rock crushing, gravel washing, log sorting, or log storage facilities." 40 C.F.R. § 122.27(b)(1). It then says that the term "[s]ilvicultural point source" discharge "*does not include*" discharges related to "*non-point source* silvicultural activities," including "harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff." *Ibid.* (emphasis added).

That language is clear. The rule classifies channeled forest road runoff—"surface drainage" related to "harvesting operations" and "road construction

and maintenance"—as nonpoint source and *not* one of the four "[s]ilvicultural point sources."

Respondent nevertheless contends (Br. 39) that the only "linguistically possible" interpretation of this text is the opposite of what it actually says. To support that strange theory, respondent points to 40 C.F.R. § 122.2, which states that a "[d]ischarge of a pollutant" "includes" surface runoff "which is collected or channelled by man." But that does not mean that *all* channeled runoff is *categorically* a "point source" discharge. Indeed, in light of the agricultural stormwater exception, it could not.

What is more, respondent's reading of Part 122.2 would reduce the Silvicultural Rule to a pointless tautology: "non-point source natural runoff is not a silvicultural point source." Resp. Br. 15.

b. Respondent repeats (at 39) the Ninth Circuit's conclusion that "natural runoff" is better interpreted as meaning *non-channeled* runoff. But EPA has rationally interpreted "natural runoff" to mean runoff "from precipitation events," channeled or not (Pet. App. 113a-114a), and that conclusion is entitled to *Auer* deference. The "minor wording changes" EPA made to the Rule in 1980 (45 Fed. Reg. 33372; see also 55 Fed. Reg. 20521) could not have worked, unnoticed, the radical revision in meaning that respondent and the Ninth Circuit postulate. Furthermore, under the rule of the last antecedent—relied on by respondent in other contexts—the phrase "from which there is natural runoff" does not modify "surface drainage" (40 C.F.R. 122.27(b)(1)), which can be read independently to exclude forest road runoff from permitting.

c. Finally, there is the matter of *Auer* deference. Whatever might be said of respondent's strained reading of the Silvicultural Rule, there assuredly is no merit to its assertion (at 41) that EPA's interpretation of the Rule is "illegitimate." EPA's approach is consistent with the regulatory language, reflects EPA's expert judgment, and was rationally explained by the agency in preambles and briefs. See 40 Fed. Reg. 56932; 41 Fed. Reg. 6282; 41 Fed. Reg. 24710; 55 Fed. Reg. 20522; 64 Fed. Reg. 46077; U.S. Br. in *Newton* (8th Cir. Sept. 8, 1997) (see Pet. Br. 34 n.4); Pet. App. 114a. It has been consistently expressed and enforced for 35 years, ever since EPA stated in explaining the final rule that "drainage [that] serves only to channel diffuse runoff from precipitation events" is "nonpoint in nature." 41 Fed. Reg. 24711. Even if the Rule were ambiguous, *Auer* would require deference to EPA's interpretation for all the reasons set forth in our opening brief (at 29-32).

C. Respondent's interpretations would undermine the purpose of the CWA.

We have demonstrated that the Ninth Circuit's decision would fundamentally undermine Congress's purpose in enacting the CWA. Pet. Br. 43-50. It would impose astronomical costs on regulators and regulated alike; invite endless litigation at all phases of the permitting process; and inject destructive uncertainty concerning an issue that has been governed for decades by settled, sensible, and workable rules that protect our Nation's waterways. And it offers no environmental benefits whatever to offset these enormous costs.

Respondent replies (at 1, 52-53) that public policy arguments must be directed to Congress, not this Court. That is true, but irrelevant. Our point was

that the Ninth Circuit's holding throws a wrench into EPA's pursuit of its statutory mission. And constructions of statutes that undermine "the achievement of an agency's ultimate purposes" in this way are disfavored absent "compelling evidence" to support them, which is conspicuously lacking here. *Weinberger* v. *Bentex Pharm., Inc.*, 412 U.S. 645, 653 (1973). EPA's conclusion that pollution from forest road runoff is "better controlled through the utilization of best management practices" must be taken seriously. 41 Fed. Reg. 24710. NEDC and its amici have no claim to know better than EPA, or the amici States to which Congress gave authority to regulate nonpoint sources and whose "primary responsibilities and rights" over land and water use Congress meant to "preserve and protect." 33 U.S.C. § 1251(b). Notably, no State supports respondent.

Respondent recites (at 7-8, 51-52) general reasons why forest road runoff should be regulated. But the question here is not *whether* such runoff should be regulated, but *how*. As we explained (at 43-50), and as EPA concluded from the outset (*e.g.*, 40 Fed. Reg. 56932), the most sensible way to regulate forest road runoff is through state BMPs, which experts and regulators alike agree work *better* than centralized NPDES permitting focused on effluent limitations.[4]

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[4] Respondent suggests (at 11, 53-54) that this case involves a "few miles" of road. But the complaint (2JA 4, 15-16, ¶¶ 6, 57) alleges "459 different discharge points" along some 40 miles of road, and violations on the two named roads *and* at "hundreds of other locations throughout Oregon State Forests." Many hundreds of thousands of miles of road would fall within the reach of the Ninth Circuit's ruling. The U.S. Forest Service pre-

D. The courts lack jurisdiction to invalidate EPA regulations in enforcement actions like this one.

1. Section 509(b) bars this suit. From the outset, NEDC sought to challenge the *validity* of EPA's Silvicultural Rule. Its complaint, after quoting the Rule, claims that "EPA may not exempt" channeled silvicultural runoff from NPDES permitting. 2JA 12 ¶¶ 40-41. As the government told the Ninth Circuit, if a "request for relief against a private party logically depends on the proposition that an EPA regulation is invalid, the suit is an impermissible 'challenge' to the regulation itself." 1JA 56. The district court should have dismissed this case *at the threshold* for lack of jurisdiction, because the complaint itself revealed that plaintiff could not prevail unless the court invalidated EPA rules.

As in *Seminole Rock*, "[a]ny doubts" about the meaning of the Phase I regulation and Silvicultural Rule "are removed by reference to the administrative construction," particularly constructions issued "concurrently with" the Rules. 325 U.S. at 417. EPA consistently has explained that the regulations exclude forest road runoff, even if channeled, from the NPDES program. Pet. Br. 30-31, 35-37. From the beginning, EPA said that "ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation" are excluded from "the § 402 permit program." 41 Fed. Reg. 6282. According to *Seminole Rock*, failure to defer to that pronouncement is to invalidate the regulation it interprets.

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dicts that it alone would have to obtain up to 400,000 permits if the decision below is left standing. See Pet. 31.

Respondent argues that a court may not defer to an agency interpretation that would make the regulation inconsistent with a federal statute. But as the United States observes (at 17), a court adjudicating a citizen enforcement action "may not disregard pertinent EPA regulations on the ground that they are inconsistent with the statute, since that would constitute the 'judicial review' of EPA action that Section 1369(b)(2) forbids." Section 509(b)(2) is clear that judicial review of agency action "shall not" occur in any "proceeding for enforcement" like this one. In such cases, *Seminole Rock* says that deference to a reasonable agency interpretation is the end of the matter. U.S. Br. 22.

Citing *Duke Energy*, the government nevertheless argues (at 17-18) that Section 509(b) would not bar a court from *interpreting* a rule to make it consistent with the court's construction of the statute. That is wrong for at least two reasons.

First, this Court in *Duke Energy* did not find that the court of appeals had engaged in "permissible" interpretation. It held that the lower court's holding could "only be seen as an implicit declaration that [the] regulations were invalid as written." 549 U.S. at 573. The same is true here. The text of both the Silvicultural Rule and the Phase I stormwater regulation clearly says that no permit is required; EPA's contemporaneous explanations confirm this meaning; yet the Ninth Circuit "interpreted" the rules to require a permit. A rule "interpretation" is no interpretation at all if it results in the precise opposite of what even the Ninth Circuit acknowledged (Pet. App. 32a) was "the intent" of the drafter. It is, instead, an *invalidation*.

Second, nothing in *Duke Energy* overrides the holding in *Seminole Rock* that the "statutory validity of the regulation" "must in the first instance be presented to" the court of appeals designated by the governing statute. 325 U.S. at 418-419. Respondent (at 20-21) points to *Seminole Rock*'s statement that "[t]he intention of Congress" in "some situations may be relevant in the first instance in choosing between various constructions." 325 U.S. at 414. But in those "situations" there is no administrative interpretation. Where there is one, as here, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Ibid.* Then a court's "only tools" are "the plain words of the regulation and any relevant interpretations of the Administrator." *Ibid.*

Seminole Rock thus controls this case with respect to the Ninth Circuit's statutory avoidance ruling. Here, both regulations unambiguously exempt the forest road activities at issue from the NPDES program. The Ninth Circuit's rejection of the regulations' unambiguous meanings on the basis of the court's own view of the underlying statute was a clear-cut invalidation of each. Even if the regulations were ambiguous, *Seminole Rock* and *Auer* mandate that "controlling weight" be given to EPA's view that its own regulations exempt channeled forest road runoff from the permit requirement.

2. Respondent now argues for the first time (at 23-24) that Section 509(b) "does not apply" because EPA's regulations "did not issue or deny an NPDES permit" (citing subdivision (F) of Section 509(b)(1)). The question whether EPA's actions fit within one of the Section 509(b)(1) categories is not properly

framed for decision because it was not raised, argued, or decided below. To the contrary, respondent conceded below that "Section 509(b)" is "one of at least two ways *to challenge an NPDES permit exemption*." NEDC Opp. to Rhg. 8 (Dkt. 111) (9th Cir. Dec. 13, 2010) (emphasis added); *id.* at 9 (similar). The Ninth Circuit apparently agreed—without discussion—holding not that the suit fell outside the 509(b)(1) categories, but that the Section 509(b) exception for grounds arising after the 120-day filing period applied. Pet. App. 7a. It would be inequitable to allow respondent to change its tune now. See *New Hampshire* v. *Maine*, 532 U.S. 742, 750-751 (2001). That is especially so because respondent did no more than mention in its brief in opposition this new argument that has divided the courts of appeals. Opp. 26 n.3; see *Friends of the Everglades* v. *EPA*, 2012 WL 5274826, at *6 (11th Cir. Oct. 26, 2012); Resp. Br. 30 n.10 (labeling a recent Sixth Circuit decision "simply incorrect").

Respondent mentions only subdivision (F). But subdivision (E) separately provides for exclusive court of appeals review of EPA action "approving or promulgating any effluent limitation or other limitation." The term "other limitation" addresses limitations other than "effluent limitation[s]." See *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071-2072 (2012) (general language "will not be held to apply to a matter" dealt with by specific language). Here, the Silvicultural Rule and Phase I regulation set forth limitations on what can be done without an NPDES permit; and they limit the silvicultural discharges that are subject to permitting. Indeed, EPA has argued (for example in *Friends of the Everglades*, *supra*) that a rule that states simply that an activity requires no permit falls within sub-

division (E). As then-Judge Ginsburg wrote—"follow[ing] the lead of the Supreme Court in according section 509(b)(1) a practical rather than a cramped construction"—consolidated permit regulations fit within the broad "effluent limitation or other limitation" language of subdivision (E). *Natural Res. Def. Council* v. *EPA*, 673 F.2d 400, 403-405 (D.C. Cir. 1982).

Furthermore, this Court's precedents establish that Section 509(b)(1)(F) applies to regulations specifying which activities are subject to permitting. As the Court explained in *du Pont*, it would be "truly perverse" if the courts of appeals could review "individual actions issuing or denying permits" but have "no power of direct review of the basic regulations governing those individual actions." 430 U.S. at 136; see also *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196 (1980) (review of EPA's disapproval of effluent restrictions should be "in the courts of appeals under § 509(b)(1)(F)" because it was "functionally similar" to issuance or denial of an NPDES permit).

That is especially clear here. To begin with, the Silvicultural Rule is the practical equivalent of a blanket permit for forest road discharges, providing the same insulation from liability that an NPDES permit—subject to court of appeals review under Subsection (F)—would provide. Furthermore, the Silvicultural and Phase I Rules subject numerous activities to NPDES permitting and effluent limitations, prohibiting those activities unless a permit is obtained. The rules as a whole surely fall within 509(b)(1)'s scope; it should make no difference that the particular aspect being challenged defines when a permit and effluent limitations are not required. See U.S. Br. 16 n.7.

3. Respondent argues (at 21) that adherence to the 120-day deadline in Section 509(b) "would open the floodgates" to "'hypothetical' lawsuits" addressed to every possible future interpretation of agency regulations. But it is respondent's argument that is hypothetical. The Federal Register gave clear notice when the rules at issue were adopted that channeled forest road runoff does not require a permit. See 44 U.S.C. § 1507 (Federal Register publication "give[s] notice of the contents of the document to a person subject to or affected by it"). The insubstantial changes EPA made to the Silvicultural Rule in 1980 had no impact on the clear notice of its scope that EPA gave in 1976, when respondent had the opportunity to raise an objection or forever hold its peace.

Section 509(b) *reduces* litigation by barring lawsuits filed after the 120-day window and preventing serial district court citizen suits in which EPA need not be a party. By contrast, respondent would allow *unending* enforcement actions over the validity of regulations, with the possibility of inconsistent district court rulings. Enforcing Section 509(b)'s 120-day deadline would not "needlessly burden the federal courts" (Resp. Br. 26), but would "best comport with the congressional goal of ensuring prompt resolution of challenges to EPA's actions." *Crown Simpson*, 445 U.S. at 196.

For these reasons, courts lack subject matter jurisdiction over the regulatory challenges presented in this enforcement action.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Plaintiff's Opposition to the Forest Product Defendants' Motion for Stay, *Nw. Envtl. Def. Ctr.* v. *Decker* (D. Or. filed Feb. 21, 2012) 6

The United States agrees with petitioners that the Ninth Circuit flouted this Court's precedents when it overturned EPA's position that channeled runoff from forest roads does not require an NPDES permit. The Solicitor General explains (at 11-12) that the Ninth Circuit "should have given *Chevron* deference to EPA's Silvicultural Rule" and "should have deferred under *Auer* to EPA's interpretation of" that Rule, which defines precipitation runoff from forest roads as "nonpoint source." "[I]ndependent[ly]," the Ninth Circuit "misapplied established *Auer* deference principles" by "ignor[ing] EPA's construction of its" Phase I regulation, which makes clear that forest road stormwater is not "associated with industrial activity." U.S. Br. 12-14.[1]

The United States recognizes too (at 14) that the Ninth Circuit's ruling "could entail significant practical burdens" for owners and operators of thousands of miles of forest roads who are now potentially in violation of the CWA and subject to substantial penalties for discharging without a permit. The scope and complexity of the permitting and litigation burden facing the industry are evident from EPA's Notice of Intent ("NOI"), 77 Fed. Reg. 30473 (May 23, 2012), which explains that forests are traversed by a "vast and diverse network" of

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[1] The problems with the Ninth Circuit's decision run even deeper than the Government acknowledges. Long before EPA filed its briefs below, it took the same unwavering position as to the meaning of its Silvicultural Rule and Phase I regulation. Pet. 7, 10. Because the meaning of those regulations was well settled decades ago, contemporaneously with their adoption, NEDC's challenge should be treated as filed too late and in the wrong court, as detailed in the petition in No. 11-338 and amicus brief of NAFO.

roads across federal, state, county, tribal and private land, which "creates a highly complex mosaic of overlapping responsibilities." *Id.* at 30475-30476. This "mosaic"—in which "[r]egional differences" abound—includes roads designed to different standards, for different purposes, over different terrain, "pass[ing] through multiple owners and multiple properties," which are already subject to federal, state and other BMP programs that "minimize or prevent discharges of pollutants into surface waters" through "a variety of effective approaches." *Id.* at 30475, 30477.

Despite the plain error of the Ninth Circuit's ruling, the Solicitor General recommends that the petition be denied. He contends that there is no "square" conflict and that EPA or congressional action may address petitioners' concerns. These arguments provide no reason to deny the petition. The Court should grant certiorari and either conduct plenary review or summarily reverse the Ninth Circuit's erroneous and extremely harmful judgment.

1. The Ninth Circuit's ruling squarely conflicts with the Eighth Circuit's decision in *Newton County*. Although *Newton County* gave two reasons for rejecting the environmental group's challenge, neither is "simply dictum." U.S. Br. 15; see *Woods* v. *Interstate Realty*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*"). And as the petition (at 25) and reply (at 10) showed, with quotations from the *Newton* briefs that the government ignores, "*channeled* runoff" was at issue in *Newton County*, even though the court did not "specifically refer" to that phrase. U.S. Br. 15. There and here, plaintiffs argued that channeled runoff is a

point source discharge under the Silvicultural Rule. The Ninth Circuit agreed with plaintiffs; the Eighth did not. Had NEDC brought this suit in the Eighth Circuit, it would have been dismissed.

2. Developments in Congress are no reason to deny the petition. The Solicitor General (at 8, 16-17) interprets a provision of the 2012 Consolidated Appropriations Act as "temporarily" "suspend[ing] the permitting requirement imposed by the court of appeals' decision." That moratorium provides very little "breathing space for EPA," petitioners, or amici, because it expires on September 30, 2012. And EPA conspicuously does not predict that it will propose a rule by then, let alone promulgate a final rule. The moratorium does, however, open a narrow window for review by this Court, which is precisely what Congress intended. See 157 Cong. Rec. H9900 (Dec. 16, 2011) ("intent" was to provide "an opportunity for the Supreme Court to weigh in"; "this provision should in no way deter the Court's proceedings") (Rep. Simpson).

"Permanent legislation" "pending" in the House and Senate is no reason to deny review either. U.S. Br. 17. Those bills have not seen action since July 15, 2011. And passage of "unenacted legislation" is highly uncertain, which is why this Court's "task is to rule on what the law is, not what it might eventually be." *Garcia* v. *Texas*, 131 S. Ct. 2866, 2867 (2011) (per curiam).

Contrary to the Government's suggestion (at 14), this Court has the "institutional capacity" to reverse the Ninth Circuit's judgment. The statutory and regulatory provisions at issue are clear and the administrative law principles that the Ninth Circuit evaded are set forth in this Court's decisions. Indeed,

because of this Court's institutional capacity, 26 Senators, 47 Representatives, and 29 State Attorneys General (including 4 that had not signed the States' amicus brief) implored the Government to support certiorari. See Addendum, *infra*.

3. The Government asks this Court to deny the petition because EPA has announced its intent to promulgate a Phase I rule specifying that forest road stormwater is not "associated with industrial activity." That is no reason to leave standing the Ninth Circuit's baseless and damaging decision.

a. Petitioners agree that the Ninth Circuit "did not hold that the CWA compels" its Phase I ruling. U.S. Br. 8. But the court's opinion leaves enough doubt on that score to encourage further litigation. The court held that "collected runoff constitutes a point source discharge of stormwater 'associated with industrial activity' under the terms of [CWA] § 502(14) and § 402(p)"—citing the statutory, not regulatory, provisions. Pet. App. 42a. It ruled that "'if [logging] activity is industrial in nature," then "*EPA is not free* to create exemptions from permitting requirements for such activity.'" *Ibid.* (emphasis added). And it held that the Phase I regulation's reference to the Silvicultural Rule "does not, *indeed cannot*, exempt" forest road discharges from NPDES permitting. *Ibid.* (emphasis added). Unless the decision is vacated, these errors invite a challenge to the new rule EPA says it plans to promulgate.

b. EPA's Notice of Intent also creates intolerable uncertainty. There is no guarantee EPA will timely follow through "'to propose'" or "'complete this revision'" anytime soon. U.S. Br. 17-18. After all, it has been *nine years* since the Ninth Circuit remanded to EPA its determination not to regulate

forest roads under Phase II, *Envtl. Def. Ctr.* v. *EPA*, 344 F.3d 832, 861 (9th Cir. 2003). Until the NOI, all that had come of that remand were representations to courts that EPA is "in the process of developing its response." Pet. App. 91a (2003 Government brief); see 2007 Gov't C.A. Amicus Br. 31 (Phase II remand is "pending").

Without doubt the catalysts for EPA's NOI—published the day before the Government filed its brief—were the certiorari petitions and this Court's call for the views of the Solicitor General. Were the Court to deny certiorari, there would be no way to ensure that EPA completes its "inten[ded]" rule revision, "expeditiously" or otherwise. U.S. Br. 18.

4. The Solicitor General overlooks the serious practical consequences that would result from leaving the Ninth Circuit's judgment undisturbed *even if* EPA revises its Phase I regulation.

a. The Ninth Circuit's erroneous decision distorts the law of review of administrative action and belittles EPA's long-held expert views. Absent review, its decision would remain binding precedent in the circuit containing some of the most heavily forested States in the Nation, *and* the circuit most likely to hear a rule challenge to any Phase I revision.

b. Absent review, the Ninth Circuit's erroneous interpretation of the Silvicultural Rule would remain precedent. The Government agrees (at 11-12) that the court of appeals erred under *Chevron* and *Auer* in holding that EPA has no leeway to define storm-water flowing through a ditch or culvert to be a nonpoint source. Yet it offers no practical response. By contrast to its view (at 17) that the decision below

"leaves EPA free to amend its Phase I regulations," the Solicitor General is silent on EPA's ability to amend its Silvicultural Rule. The Government also does not discuss how the Ninth Circuit's ruling will affect the validity of *other* "regulations that further define the term 'point source' as it applies to various activities and facilities." U.S. Br. 2; see 40 C.F.R. Part 22, Subpart B (regulations defining point sources).

c. So long as the Ninth Circuit's ruling stands, EPA will be forced to make new rules *around* an erroneous decision. There is no good reason why EPA's new rulemaking should be constrained or even influenced by a decision that contorts administrative law principles requiring deference and denigrates a position EPA has held for 35 years. Vacatur would restore the status quo ante as to Phase I and inform EPA's conduct of the Phase II remand.

d. Absent action by this Court, this costly and disruptive litigation will continue. Neither EPA's proposed regulation nor Congress's temporary moratorium will resolve NEDC's claims for penalties, attorneys' fees and injunctive relief based on allegations of more than 10 years of past violations on all logging roads in Oregon State forests. NEDC seeks substantial monetary penalties, plus attorneys' fees. Am. Complt. ¶ 1; see 33 U.S.C. §§ 1319(d), 1365(a). And it seeks "injunctive relief requiring defendants" to "remedy any environmental damage caused by their unpermitted discharges." NEDC Opp. to Stay Mot. 12 (D. Or.). These claims require the resolution of complex legal and factual issues, including identifying for which roads NEDC may seek penalties, what parties may have been required to obtain permits for each road, the level of rainfall

necessary to cause discharges on each road, and the number and severity of discharges during the decade covered by the lawsuit. Accordingly, "EPA's proposed regulatory approach" decidedly does *not* "moot petitioners' objections" to the erroneous decision below. U.S. Br. 18. And if EPA does not act, the consequences may be even more severe, as NEDC seeks injunctive relief halting log hauling operations on unpermitted roads.

Unless and until Phase I revisions become final, under the Ninth Circuit's decision every discharge of channeled forest road runoff within vast western forests violates the CWA, except any covered by the temporary congressional rider. New citizen suits attacking past and present discharges could expose owners and operators of forest roads to enormous liability, regardless of action by EPA or Congress.

5. The Government's sole response to "alleviate" these "immediate practical concerns" is to observe (at 19) that EPA has made available, "as appropriate, the Multi-Sector General Permit (MSGP) for discharges *associated with industrial activities*" (emphasis added).[2] But that MSGP is *inappropriate*, because it was not designed to apply to forest roads, which EPA determined are *not* "associated with industrial activity."

Far from being a solution, this suggestion creates its own set of serious problems. There is an enormous difference between contained industrial sites, where the MSGP's requirements may be practical, and the "highly complex mosaic" of forest roads, "vast by any measure," that EPA now

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[2] http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf

cavalierly tries to squeeze into a general permit never designed with such roads in mind. 77 Fed. Reg. at 30475.

For example, the MSGP requires that permittees map the location of all "impervious surfaces," "stormwater conveyances including ditches, pipes, and swales," and "stormwater inlets and outfalls, with a unique identification code for each outfall." MSGP § 5.1.2. But the Government does not know even such basic information as whether forest roads on *its own land* are "on the order of tens of thousands" or "hundreds of thousands of miles," let alone where every potential discharge along those roads is located. 77 Fed. Reg. at 30475. Even if owners and operators of forest roads could map every possible source of a discharge to "navigable waters," the costs of doing so would be astronomical and out of all proportion to any benefits given the effectiveness of BMPs. *Id.* at 30477.[3]

Another example: the MSGP requires frequent inspections of every discharge, and yearly inspection "during a period when a stormwater discharge is occurring." MSGP § 4.1.1. Permittees must "collect a stormwater sample from each outfall," "within the first 30 minutes" of a discharge or "as soon as practicable" thereafter. MSGP §§ 4.2.1, 4.2.3. These requirements, tailored for industrial sites, are impracticable for forest roads, which may be used "during harvesting once every 20 years or so." 77 Fed. Reg. at 30475. And noncompliance with any MSGP provision violates the CWA. MSGP §§ 1.2, 3.1.

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[3] The phrase "navigable waters" is "notoriously unclear," further complicating compliance with the MSGP. *Sackett* v. *EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

Environmental groups frequently sue to enforce general permits, favoring venue in the Ninth Circuit. *E.g.*, *WaterKeepers* v. *AG Indus. Mfg.*, 375 F.3d 913 (9th Cir. 2004); *S.F. BayKeeper* v. *Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002); *NRDC* v. *Sw. Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000); *Ecological Rights Found.* v. *Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000). The damages sought in such suits have been enormous. See *Humane Soc'y* v. *HVFG LLC*, 2010 WL 3322512, at *2 (S.D.N.Y. Aug. 19, 2010) (seeking "over $600 million in civil penalties"); *WaterKeepers* v. *AG Indus. Mfg.*, 2005 WL 2001037, at *6 (E.D. Cal. Aug. 19, 2005) (seeking $5 million against company worth $907,000). Given the poor fit between the MSGP and forest roads, forest road operators and owners would be sitting ducks for such suits.

6. The Government presents a patently false dilemma by claiming that, if the Court grants the petition, it faces an "all-or-nothing" "binary choice: either hold that the stormwater discharges at issue here are not subject to CWA regulation at all (as petitioners contend), or hold that the discharges require NPDES permits (as respondent argues)." U.S. Br. 19. This case poses no such dilemma. As the Solicitor General concedes (at 12-13), petitioners ask the Court to hold that "*under the current regulatory scheme*," they "were not required to obtain an NPDES permit for any of the activities at issue here." Reversal of the Ninth Circuit's judgment would leave EPA free to consider a full "range of regulatory options" (U.S. Br. 19), while relieving the substantial problems that the Ninth Circuit improperly created.

That EPA could "supersed[e]" this Court's decision prospectively by "regulatory action" is

unremarkable. U.S. Br. 19. Agencies usually can supersede this Court's regulatory interpretations, just as Congress can supersede this Court's statutory interpretations. Yet the Court grants certiorari to decide regulatory and statutory questions all the time.

7. This Court should grant the petition and order plenary review, as it has done in other CWA cases in which the United States acknowledged lower court error yet recommended denial of certiorari. See *Coeur Alaska* v. *Se. Alaska Conservation Council*, 557 U.S. 261 (2009) (Ninth Circuit failed to defer to CWA regulations and improperly expanded the NPDES permitting regime); *S. Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe*, 541 U.S. 95 (2004).

Alternatively, this is an especially appropriate case for "summary disposition on the merits." S. Ct. Rule 16.1. Summary reversal is a useful tool, when the lower court has disregarded this Court's precedent, to ensure consistency in the law and respect for this Court's decisions. *E.g.*, *Wilkins* v. *Gaddy*, 130 S. Ct. 1175, 1177 (2010) (per curiam) (summarily reversing decision "at odds" with this Court's precedents). Here, the Ninth Circuit's ruling is so clearly contrary to *Chevron*, *Auer*, and their progeny that summary disposition is warranted. See Diarmuid O'Scannlain, *A Decade of Reversal*, 14 LEWIS & CLARK L. REV. 1557, 1559 (2010) ("approximately one in ten Ninth Circuit cases reviewed by the Supreme Court results in a summary reversal"); *Karuk Tribe* v. *USFS*, 2012 WL 1959231, at *30-31 (9th Cir. June 1, 2012) (en banc) (describing the ruling here as an "extreme recent exampl[e]" of the court "break[ing] from decades of precedent and creat[ing] burdensome, entangling

environmental regulations out of the vapors") (M. Smith, J., dissenting).

Summary reversal would also ensure that the serious adverse consequences for defendants, the forest products industry generally, and state regulators, described above, will not result from a blatantly erroneous decision. That is another appropriate use of summary disposition. *E.g.*, *Thaler* v. *Haynes*, 130 S. Ct. 1171, 1172 (2010) (per curiam) (summarily reversing "holding [that], if allowed to stand, would have important implications").

This case is procedurally well-postured for summary reversal. No party can complain that it has not argued the merits. The merits were briefed in the certiorari papers by the parties and amici, including Oregon, 26 State Attorneys General, the National Association of Counties, and forest road user organizations, as well as by the Solicitor General. Respondent devoted much of its brief in opposition to the merits. In addition, the Ninth Circuit's error is plain and arises from disregard of settled precedent that is in no need of further percolation. *Cf. Spears* v. *United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). Given EPA's intent to undertake new rulemaking, summary disposition is "just under the circumstances" and a compelling alternative to plenary review. 28 U.S.C. § 2106; see EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 344, 351 (9th ed. 2007).

CONCLUSION

The Court should grant the petition for certiorari and either order plenary review or summarily

reverse the Ninth Circuit's judgment.[4]

Respectfully submitted.

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JUNE 2012

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[4] This Court may alternatively wish to hold the petition in abeyance until EPA undertakes the promised Phase I rule-making, during which period the current stay of district court proceedings pending this Court's action on the petition should remain in place. See SUPREME COURT PRACTICE, *supra*, at 339. If EPA does not expeditiously issue a final rule, petitioners would move for consideration of the petition some months from now.

United States Senate
Washington, DC 20510

February 14, 2012

The Honorable Eric Holder
Attorney General
Department of Justice
950 Pennsylvania Ave., NW
Wahington, DC 20530

Dear Attorney General Holder:

On December 12, 2011 the Supreme Court issued an order inviting the Solicitor General to provide the views of the United States on two petitions challenging the Ninth Circuit Court of Appeals' ruling overturning longstanding U.S. Environmental Protection Agency (EPA) regulations regarding the application of the Clean Water Act (CWA) to silvicultural activities. We write to urge you to support EPA's regulations of forest roads and other forest management activities as nonpoint sources and support review by the Supreme Court of the Ninth Circuit decision.

For 35 years, the EPA, through both Democratic and Republican presidencies, prudently recognized that forest roads and other forest management activities are non-point sources under the CWA and are most appropriately regulated through Best Management Practices at the state level. Congress and the courts have consistently supported this interpretation.

The Ninth Circuit's decision to reinterpret these provisions of the CWA imposes unprecedented and onerous regulatory burdens on private, state, tribal, and federal forest managers and the agencies that regulate them. Furthermore, it exposes forest managers and operators as well as state and federal agencies to CWA-based lawsuits that could impair critical work to improve watersheds, reduce fire risk, maintain forest access and support family-wage jobs in struggling rural communities.

Last December Congress passed, and the President signed, H.R. 2055, the omnibus appropriations bill, which included language preserving EPA's existing regulations under the CWA for fiscal year 2012. This provision, which was based on House and Senate bills with strong bipartisan support in both chambers, demonstrates strong congressional support for maintaining EPA's regulations and reversing the position of the Ninth Circuit Court of Appeals.

We urge you to uphold 35 years of regulatory interpretation by defending the nonpoint source designation of forest roads and silviculture practices and seek Supreme Court review of the Ninth Circuit's decision.

Sincerely,

/s/
Ron Wyden
United States Senator

/s/
Mike Crapo
United States Senator

/s/
Kay R. Hagan
United States Senator

/s/
Roy Blunt
United States Senator

/s/
Joe Manchi III
United States Senator

/s/
Saxby Chambliss
United States Senator

/s/
Mary L. Landrieu
United States Senator

/s/
Olympia J. Snowe
United States Senator

/s/
Mark Begich
United States Senator

/s/
Pat Roberts
United States Senator

/s/
Claire McCaskill
United States Senator

/s/
Roger F. Wicker
United States Senator

/s/
Jeanne Shaheen
United States Senator

/s/
Susan M. Collins
United States Senator

/s/
Mark L. Pryor
United States Senator

/s/
David Vitter
United States Senator

/s/
Amy Klobuchar
United States Senator

/s/
Michael B. Enzi
United States Senator

/s/
Herb Kohl
United States Senator

/s/
James E. Risch
United States Senator

/s/
John Boozman
United States Senator

/s/
Thad Cochran
United States Senator

/s/
Lindsey Graham
United States Senator

/s/
Richard Burr
United States Senator

/s/
Patrick J. Toomey
United States Senator

/s/
Marco Rubio
United States Senator

Congress of the United States
Washington, DC 20515

February 14, 2012

Mr. Jack Lew
White House Chief of Staff
1600 Pennsylvania Ave., NW
Wahington, DC 20500

Dear Mr. Lew:

As sponsors of H.R. 2541, the Silviculture Regulatory Consistency Act, we are writing you to encourage the Administration to defend before the Supreme Court EPA's 35 year interpretation that forest roads should be regulated as nonpoint sources under the Clean Water Act (CWA). As you know, the Supreme Court recently asked for the views of the federal government on this issue because of a decision by the Ninth Circuit Court that reversed this proven and longstanding practice.

We support our states and their rigorous oversight of forest roads through the use of Best Management Practices (BMP). BMPs are environmentally proven and responsible approaches for regulating runoff that allow states to appropriately address unique, local forest management challenges – as opposed to one size fits all National Pollutant Discharge Elimination Systems (NPDES) permits under the CWA.

Requiring CWA permits for forest roads would impose unprecedented and onerous regulatory burdens on states and forest owners and operators that would seriously threaten sound forest management and the many good paying jobs it supports. Furthermore, the Ninth Circuit's decision would subject private, tribal, state and federal forest management to debilitating citizen lawsuits. Given the benefits to watersheds, the increased forest access, the reduced forest fire risk, and the hundreds of thousands of rural jobs that come with responsible forest management, we can ill afford to effectively shut down forest production under a court-imposed regulatory requirement that runs counter to 35 years of success.

Congress has consistently supported the EPA's existing regulations and state BMPs because they provide an approach to water quality management that works. The Ninth Circuit Court's decision to unilaterally reinterpret the CWA is inconsistent with good public policy and contrary to congressional intent. We introduced H.R. 2541 to codify EPA's existing forest roads rule into law, and a similar provision was included in the 2011 Omnibus Appropriations Act. This legislation, which enjoys bipartisan support from members representing nearly every forested state, is a clear rebuttal to the Ninth Circuit and a strong reaffirmation of congressional support for EPA's longstanding interpretation of forest roads regulation under the CWA.

As the administration prepares its views for presentation to the Supreme Court by the Solicitor General, we strongly urge you to fully defend EPA's existing rule and seek to overturn the Ninth Circuit's erroneous interpretation of the Clean Water Act and EPA's policy.

Sincerely,

/s/
Jaime Herrera Beutler
Member of Congress

/s/
Kurt Schrader
Member of Congress

/s/
Greg Walden
Member of Congress

/s/
Collin Peterson
Member of Congress

/s/
Doc Hastings
Member of Congress

/s/
Sanford Bishop Jr.
Member of Congress

/s/
Bob Goodlatte
Member of Congress

/s/
Bennie Thompson
Member of Congress

/s/
Cathy McMorris Rodgers
Member of Congress

/s/
Tim Holden
Member of Congress

/s/
Glenn Thompson
Member of Congress

/s/
G.K. Butterfield
Member of Congress

/s/
Thomas Petri
Member of Congress

/s/
Mike Michaud
Member of Congress

/s/
Shelley Moore Capito
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Mike McIntyre
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Jo Ann Emerson
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John Barrow
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Jeff Denham
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/s/
Bill Huizenga
Member of Congress

/s/
Robert Wittman
Member of Congress

/s/
Mick Mulvaney
Member of Congress

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Reid Ribble
Member of Congress

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Member of Congress

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David McKinley
Member of Congress

/s/
Renee Ellmers
Member of Congress

/s/
Morgan Griffith
Member of Congress

CC: Lisa Jackson, Administrator of the Environmental Protection Agency
Tom Vilsack, Secretary of the United States Department of Agriculture
Ken Salazar, Secretary of the United States Department of the Interior

State of Arkansas
The Attorney General
Dustin McDaniel
323 Center Street, Suite 200
Little Rock, Arkansas 72201

January 31, 2012

Donald B. Verrilli, Jr.
Solicitor General
950 Pennsylvania Ave., NW
Wahington, DC 20530-0001

Re: Decker v. NEDC, Nos. 11-338, 11-347

Mr. Verrilli,

The State of Arkansas writes on behalf of the *Amici Curiae* States, who filed a brief in this case on October 14, 2011, along with the other interested states listed below. On December 12, 2011, the United States Supreme Court invited the Solicitor General to submit the views of the United States on this issue. The States ask that you carefully consider the impact this case has on the States when making your decision. Amici states urge the Solicitor General to support the grant of certiorari because the Ninth Circuit's decision effectively rescinds the authority granted to the states by Congress' passage of 33 U.S.C. § 1329, and rescinds the best management programs adopted and tailored by each indi-

vidual state in favor of the CWA's NPDES permit program.

EPA's approach that channeled precipitation from forest management and timber harvesting roads should be managed as a non-point source of pollution has been consistently upheld by other courts. The Solicitor General should urge the Court to grant certiorari because the decision of the Ninth Circuit is at odds with the decisions of other circuits and threatens the consistent interpretation upon which EPA, the states, and the forest industry have relied since the inception of the CWA.

The Amici States ask the Solicitor General to consider the long term application of the Silviculture Rule, the impact this sudden change would have on the States, as well as EPA, and the departure from previous case law that the change represents. This issue will fundamentally impact the state programs that have been developed and enforced based upon the long term application of the Silviculture Rule. After a review of these issues we request the Solicitor General urge the Supreme Court to grant certiorari for this case.

Congress enacted the Clean Water Act ("CWA") in 1972. The CWA provided EPA with the authority to implement a consistent program throughout the U.S. designed to protect the waters of the nation from pollution. *See, e.g. Arkansas v. Oklahoma,* 503 U.S. 91, 110 (1992) (CWA's objective was "authorizing EPA to create and manage a uniform system of interstate water pollution regulation"). Prior to the enactment of the CWA, protection of the waters was handled by individual states. *See* S. Rep. No. 92-414, 1-11 (1971).

The CWA's cornerstone is a permitting requirement for "point source" discharges, *i.e.*, discharges of

pollutants through "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft ***." 33 U.S.C. § 1362(14). This permitting program is the National Pollutant Discharge Elimination System (NPDES) permitting program.

EPA promulgated rules to implement the NPDES permitting program, including rules clarifying when Permits are and are not required. One of these rules is known as the Silvicultural Rule. The Silvicultural Rule states:

> (a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.
>
> (b) *Definitions.*
>
> (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include nonpoint source silvicultural activities* such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, *surface drainage, or road construction and maintenance from which there is natural runoff.* However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209, 120 and part 233) (emphasis added).

40 C.F.R. § 122.27. EPA has consistently maintained that, pursuant to this rule, "ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 [point source] permit program" 41 Fed. Reg. 6,282 (Feb. 12, 1976). State agencies charged with implementing the CWA have followed EPA's lead, and the clear language of the Silvicultural Rule, and have managed runoff from timber harvest roads as non-point sources of pollution.

Congress recognized that runoff from timber harvesting operations and forest roads, if improperly managed, can result in a significant degradation of water quality. Congress also recognized that management of non-point source activities is best handled by state and local government. To address the issue of non-point source runoff, Congress enacted 33 U.S.C. § 1329. This law requires all states to develop best management practices and programs (BMPs) for non-point source pollution and report to EPA the BMPs that are being utilized within a state to reduce, and in some instances eliminate, water pollution from non-point sources. *See*, 33 U.S.C. § 1329.

Again, the Amici states urge the Solicitor General to support the grant of certiorari because the Ninth Circuit's decision effectively rescinds the authority granted to the states by Congress' passage of 33 U.S.C. § 1329, and rescinds the best management programs adopted and tailored by each individual state in favor of the CWA's NPDES permit program. We welcome the opportunity to discuss the States' concerns further with you. Thank you for your time and consideration of this matter.

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RECORD AND BRIEFS

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Nos. 11-338 and 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, *et al.*,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

GEORGIA-PACIFIC WEST, INC., *et al.*,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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Date: June 2012

RULE 29.6 STATEMENT

The statement in the Respondent's Brief in Opposition remains accurate.

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INTRODUCTION

The amicus curiae brief of the United States correctly argues that this Court should deny the petitions for writs of certiorari. *See* U.S. Br. at 1, 8, 11, 14, 20, 21. Specifically, the United States agrees with Respondent Northwest Environmental Defense Center (NEDC) that the court of appeals' interpretation of the Clean Water Act rules at issue does not conflict with decisions of other circuits or of this Court. As the United States points out, no other court has addressed whether the Environmental Protection Agency's Phase I stormwater regulation requires National Pollutant Discharge Elimination System (NPDES) permits for stormwater discharges from pipes, ditches and channels along logging roads. The United States also agrees with NEDC that the court of appeals had the power to interpret EPA's rules as it did and that the court did not expressly or implicitly invalidate any rule in contravention of section 509(b)(2) of the Act, 33 U.S.C. § 1369(b)(2). Although the United States contends that the court of appeals erred by not deferring to EPA's interpretation of the applicable regulations, the United States also acknowledges that its claimed error does not warrant review by this Court. Finally, the United States agrees with NEDC that the petitions do not present questions of great practical importance that warrant this Court's attention.

I. The court of appeals' decision does not conflict with decisions of other circuits or of this Court.

In this Clean Water Act citizen suit, the court of appeals held that NEDC's complaint stated a claim

for relief by alleging that the petitioners must comply with EPA's Phase I stormwater regulation, 40 C.F.R. § 122.26, which requires NPDES permits for stormwater discharges associated with the logging industry. The court further held that another regulation, the so-called silvicultural rule, 40 C.F.R. § 122.27, does not exclude stormwater discharged from pipes and ditches along active logging roads from the Phase I rule or otherwise redefine those discharges as nonpoint-source pollution that is exempt from the NPDES permit requirement. With its filing in this Court, the United States confirms that these narrow issues of regulatory construction do not warrant review. U.S. Br. at 1, 8, 11, 14, 20, 21.

1. As the United States explains, the court of appeals' regulatory interpretations do not conflict with any other decision because "[t]he court below is the first court of appeals to address whether EPA's Phase I industrial stormwater regulation, 40 C.F.R. § 122.26(b)(14), requires permits for the type of discharges at issue." U.S. Br. at 15 (citing NEDC Opp. Br. at 15-16). The United States' brief confirms NEDC's position that the court of appeals' decision does not conflict with either *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998), or *Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325 (D. Vt. 2004), *aff'd*, 139 Fed. Appx. 3381 (2005). U.S. Br. at 15-16; *and see* NEDC Opp. Br. at 16-18.

Nor have the courts issued conflicting interpretations of the silvicultural rule. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (holding that 40 C.F.R. § 122.27 is not an NPDES exemption for point-source pesticide dis-

charges associated with forestlands); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates*, 278 F. Supp. 2d 654 (E.D.N.C. 2003) (holding that 40 C.F.R. § 122.27 is not an NPDES permit exemption for stormwater drainage ditches associated with forestlands); *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.*, No. 01-2821, 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003) (holding that 40 C.F.R. § 122.27 does not exempt stormwater drainage ditches associated with forestlands from the NPDES permit requirement); *and see also Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999) (holding that discharges of collected and channeled stormwater associated with timber harvest are subject to the NPDES permit requirement).

2. The United States also agrees with NEDC that the court of appeals' decision does not conflict with any cases decided under section 509(b) of the Act, 33 U.S.C. § 1369(b), because the court of appeals did not expressly or implicitly invalidate any EPA rule. U.S. Br. at 7, 8-11, 14-15. The United States correctly states that "Section 1369(b)(2) did not preclude the courts below from exercising jurisdiction over this citizen suit." U.S. Br. at 9 (citation omitted).

Specifically, the United States explains that:

> Contrary to petitioners' contention, * * * the court of appeals did not expressly or implicitly invalidate either the Silvicultural Rule or the EPA regulation that defines the term "stormwater discharge associated with industrial activity." Rather, the court of appeals simply interpreted those regulations in a manner different from the construction advanced in the government's amicus brief. * * * [J]ust as a court does not invalidate a statute by construing it to avoid

> perceived constitutional difficulties, the court of appeals did not invalidate the Silvicultural Rule by adopting the interpretation that the court viewed as necessary to achieve compliance with the governing statute. * * * And because EPA did not announce its official reading of the Silvicultural Rule at the time of the rule's promulgation, respondent could not reasonably have been expected to challenge that potential reading under Section 1369(b)(1) at that time.

U.S. Br. at 9-10 (citing *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 573, 581 (2007)) (other citations omitted); *see also* U.S. Br. at 14-15. The United States' agreement that the court of appeals' reading of the rules is a permissible construction of their terms definitively lays to rest petitioners' section 509(b) arguments and confirms that NEDC did not challenge, and the court of appeals did not strike down, any rule. NEDC Opp. Br. at 19-26. "Further review of this issue is not warranted." U.S. Br. at 11.

3. Although the United States asserts that the court of appeals erred by refusing to defer to EPA's interpretation of the NPDES rules, U.S. Br. at 11-14, it acknowledges that its alleged error—which involves only the application of settled principles of law to the regulations at issue and presents no conflict with any other judicial decision—does not warrant review by this Court. U.S. Br. at 8 ("On the merits, the court erred in failing to give appropriate deference to EPA's interpretation of its own regulations. That error, however, does not warrant this Court's review."). NEDC agrees that there would be no reason to review the court of appeals' application of correctly stated rules of law to the interpretation of

EPA's regulations, even if, as the United States contends, the court of appeals reached an incorrect result.

4. Review is also unnecessary because the court of appeals did not err in applying this Court's deference precedents. EPA's interpretation of the silvicultural rule is not entitled to deference, under *Chevron* or *Auer*, because EPA's construction would place the rule in conflict with the plain language of the Act and there is an alternative reading of the rule that is consistent both with the Act's clear terms and the regulation's own language.

The United States notes that EPA, in the amicus briefs it filed below, construed the silvicultural rule to mean that "all precipitation-driven runoff from logging roads is excluded from NPDES permitting requirements even if it flows through a ditch, channel or culvert before being discharged into navigable waters." U.S. Br. at 5. The United States attempts to justify EPA's interpretation of the silvicultural rule by claiming that the term "discrete conveyance" in the statutory definition of "point source" leaves room for some "exclusion by interpretation." U.S. Br. at 12 (citing *Nat. Res. Defense Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977)). But while EPA may have some room to interpret and further define the term "point source," EPA does not have the power to *redefine* pipes, ditches and channels as nonpoint sources because the statute specifically defines those conveyances as "point sources." *Costle*, 568 F.2d at 1377, 1382; *Forsgren*, 309 F.3d at 1190; 33 U.S.C. § 1362(14).

The court of appeals correctly noted that a court reviewing an agency's construction of a statute must

first determine whether Congress has directly spoken to the precise question at issue. State Pet. App. 10-11 (citing, *inter alia*, *Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 842-43 (1984)). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. The court of appeals also correctly noted that NEDC alleged that the discharges at issue are from pipes, ditches and channels and that the Act specifically defines those conveyances as "point sources." State Pet. App. 5-7, 11, 13. By specifically providing that the term "discrete conveyance" includes at a minimum any pipe, ditch or channel, Congress unambiguously defined pipes, ditches and channels as "discernible, confined and discrete conveyances" and foreclosed EPA's ability to redefine them as nonpoint sources. *Costle*, 568 F.2d at 1377, 1382; *Forsgren*, 309 F.3d at 1185-86, 1188 n.6, 1190. **Indeed, the case that the United States relies upon addresses stormwater discharges associated with silvicultural activities and clearly states that "the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of §402."** *Costle*, 568 F.2d at 1377; *and see* U.S. Br. at 12.

Because the CWA unambiguously defines pipes, ditches, and channels as discernible, confined and discrete conveyances—as "point sources"—EPA does not have the power to construe the terms "discrete conveyance" in a manner that redefines pipes, ditches and channels as nonpoint sources. The court of appeals did not err by refusing to afford *Chevron* or

Auer deference to an interpretation of the silvicultural rule that would violate the statute when, as the United States concedes, the alternative construction adopted by the court is a permissible reading of the regulation's language.

5. Nor did the court of appeals err by refusing to defer to EPA's interpretation of the Phase I stormwater rule. The United States agrees that the Phase I rule lists Standard Industrial Classification (SIC) 2411 ("Logging") as an "industrial activity" that requires NPDES permits for stormwater discharges. U.S. Br. at 13. The United States nonetheless argues that the court of appeals should have afforded *Auer* deference to EPA's contention that the Phase I regulation only requires NPDES permits for stormwater discharges associated with "traditional industrial sources such as sawmills" or for discharges from "the four categories of silvicultural facilities" that EPA had already defined as point sources in the silvicultural rule. U.S. Br. at 13-14.

As an initial matter, sawmills are in an entirely different SIC category from logging. Sawmills are in SIC 2421 (entitled "Sawmills and Planing Mills, General"). *See* ER 47 at 93.[1] By regulating SIC 2411 (logging) *and* SIC 2421 (sawmills), EPA demonstrated its intent to regulate *both*. EPA's contrary positions are not entitled to deference because they are flatly inconsistent with the text of the Phase I rule. *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

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[1] ER refers to the Appellant's Excerpts of Record on file with the court of appeals. They are cited as "ER [document number] at [excerpts of record page number]."

According to the SIC Manual, SIC 2411 includes "[e]stablishments primarily engaged *in cutting timber* and in producing ... primary forest or wood raw materials ... *in the field*." ER 47 at 93 (emphasis added). EPA also clearly states in the preamble to the rule that "EPA intends that the list of applicable SICs will define and identify what industrial facilities are required to apply." 55 Fed. Reg. 47990, 48011 (Nov. 16, 1990). The Phase I rule also states:

> For the categories of industries identified in this section, the term [stormwater discharge associated with industrial activity] includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; [and] material handling sites * * *.

40 C.F.R. § 122.26(b)(14). As is evident from the list of "associated" discharges, "industrial plant yards" are just one of the locations regulated by EPA's rule. *See also* 55 Fed. Reg. at 48007 (noting that EPA was "supplementing" the "at an industrial plant" language "with a description *of various types of areas that are directly related to an industrial process* (e.g., industrial plant yards, immediate access roads and rail lines, drainage ponds, material handling sites...)") (emphasis added).

The Phase I rule does not say that "NPDES permits are required for traditional industrial sources such as sawmills." Nor does it say that "NPDES permits are required for stormwater discharges from the four silvicultural point sources listed in 40 C.F.R. § 122.27." Rather, by including SIC 2411 on the

Phase I list EPA required permits for stormwater discharges associated with industrial "logging" (cutting timber), including discharges along "immediate access roads . . . used . . . by carriers of raw materials." *See* NEDC Opp. Br. at 7-10, 28-29. EPA's far narrower interpretation of its rule is not entitled to deference because it is plainly inconsistent with the text of the regulation. *Auer*, 519 U.S. at 461-62.

II. The court of appeals' decision does not present a question of great practical importance.

The United States also correctly explains that the petitions do not present questions of great practical importance that require this Court's attention. In response to the petitioners' claims that the court of appeals' decision warrants review because it threatens to impose significant compliance burdens on regulators and the timber industry, the United States notes that both Congress and EPA have taken steps to mitigate petitioners' concerns. U.S. Br. at 16-20.

NEDC agrees with the United States that EPA's public rulemaking process (for which the congressionally enacted temporary permitting moratorium has allowed some breathing room) is the appropriate venue for addressing practical concerns related to EPA's regulation of point-source stormwater discharges along logging roads. U.S. Br. at 17-18. Although the industry petitioners complain that NPDES permit development "often takes years" and is subject to administrative and judicial challenge, EPA has, without challenge, made the Multi-Sector General Permit available for owners and operators wishing to obtain coverage in EPA jurisdictions. U.S. Br. at 20. EPA's action in this regard is consistent

with the Ninth Circuit's guidance that a general permitting program can be used and that "the permitting process is not necessarily onerous." State Pet. App. at 51. Individual NPDES permits are also available in states with authorized NPDES programs.

In any event, in light of EPA's initiation of rulemaking to address stormwater discharges from logging roads, it is uncertain at this point whether EPA will even require permits for those pollution sources. The outcome of that rulemaking is at this point unknown and whatever legal issues it may present are matters to be addressed when it is completed. For now, however, the supposed burdens of NPDES permits are speculative and best addressed through the ongoing regulatory processes. Congress explicitly delegated to EPA and the states the authority and responsibility to develop stormwater discharge regulations and appropriate NPDES permitting programs. Supreme Court review is not necessary where EPA has initiated the steps to do so and where the many states authorized to issue NPDES permits can relieve regulatory burdens by developing general or individual permits that address local concerns.

CONCLUSION

For the foregoing reasons, and for the reasons stated in NEDC's Brief in Opposition, the petitions for writs of certiorari should be denied.

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Date: June 2012

Nos. 11-338 and 11-347

In the Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, ET. AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

GEORGIA-PACIFIC WEST, INC., ET AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that a suit in which liability depends on the interpretation of Clean Water Act (CWA) regulations, and in which the court rejected the construction of the regulations proffered by the Environmental Protection Agency (EPA), may be adjudicated under the CWA's citizen suit provision, 33 U.S.C. 1365(a), rather than under the CWA's judicial review provision, 33 U.S.C. 1369(b).

2. Whether the court of appeals erred in not deferring to EPA's interpretation of the Phase I industrial stormwater regulation, 40 C.F.R. 122.26(b)(14), that runoff from logging roads does not constitute a stormwater discharge "associated with industrial activity."

3. Whether the court of appeals erred in not deferring to EPA's interpretation of the Silvicultural Rule, 40 C.F.R. 122.27(b)(1), that runoff from logging roads constitutes silvicultural nonpoint-source pollution.

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In the Supreme Court of the United States

No. 11-338

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, ET. AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

No. 11-347

GEORGIA-PACIFIC WEST, INC., ET AL., PETITIONERS

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The questions presented involve both jurisdictional and substantive issues pertaining to the application of the National Pollutant Discharge Elimination System (NPDES) permitting program to stormwater discharges from logging roads. The United States has a substantial interest in the proper resolution of those questions. Congress has entrusted the Environmental Protection

Agency (EPA) with enforcement of the Clean Water Act (CWA), including administration of the NPDES program, and the proper interpretation of two of EPA's NPDES regulations (40 C.F.R. 122.26(b)(14), 122.27(b)(1)) is at issue in this case. The threshold issue involving 33 U.S.C. 1365(a) and 1369(b) potentially affects the availability of avenues for enforcing the CWA and challenging EPA action. At the Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

STATEMENT

1. a. In 1972, Congress passed the Federal Water Pollution Control Act Amendments (often referred to as the CWA). 33 U.S.C. 1251 *et seq.* The CWA establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant"—defined as "any addition of any pollutant to navigable waters from any point source"—except "as in compliance with" specified provisions of the Act. 33 U.S.C. 1311(a), 1362(12)(A).

The Act defines "point source" as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. 1362(14). For most point-source discharges, regulated entities achieve compliance by following the

terms of an NPDES permit issued by EPA or an authorized State pursuant to CWA Section 402, 33 U.SC. 1342, or a permit issued by the Army Corps of Engineers under CWA Section 404, 33 U.S.C. 1344. Other CWA provisions establish mechanisms other than permits to address discharges from "nonpoint sources." *E.g.*, 33 U.S.C. 1314(f), 1329.

b. After the CWA was enacted in 1972, EPA struggled with the task of regulating stormwater discharges from the hundreds of thousands of potential point sources. In 1973, to conserve the agency's enforcement resources for more significant sources of pollution, the EPA promulgated a rule that exempted certain discharges—*e.g.*, discharges from stormwater runoff and from silvicultural activities, including forest-land runoff—from the NPDES permitting requirements. See *NRDC* v. *Costle*, 568 F.2d 1369, 1372-1373 & n.5 (D.C. Cir. 1977) (citing 40 C.F.R. 125.4(f) and (j) (1975)). In *NRDC* v. *Costle*, the district court invalidated that exemption as conflicting with CWA Section 402, and the D.C. Circuit affirmed. The D.C. Circuit concluded that, under the statutory scheme as it existed at that time, EPA did "not have authority to exempt categories of point sources from the permit requirements of § 402." *Id.* at 1377; see *id.* at 1383 ("We find a plain Congressional intent to require permits in any situation of pollution from point sources."). The court acknowledged, however, that "[t]here is an initial question, to what extent point sources are involved in agricultural, silvicultural, and storm sewer runoff." *Id.* at 1377. The court stated that the statutory definition of "point source" "suggests that there is room here for some exclusion by interpretation." *Ibid.*

In that vein, EPA also promulgated regulations that further define the term "point source" as it applies to various activities and facilities, including silvicultural sources. In 1976, the agency adopted the Silvicultural Rule, which defined four categories of silvicultural facilities as point sources but excluded from that definition (*inter alia*) "road construction and maintenance from which runoff results from precipitation events." 40 C.F.R. 125.54(a)(1), cmt. (1976). The current version of the Silvicultural Rule, as amended in 1980, maintains the same definition of "silvicultural point source" but now excludes (in pertinent part) "road construction and maintenance from which there is natural runoff." 40 C.F.R. 122.27(b)(1).[1] EPA has construed that rule to mean that logging roads are not silvicultural point sources, even if the runoff from logging roads flows through a ditch, channel, or culvert before being released into waters of the United States. See J.A. 27, 39.

c. In 1987, Congress amended the CWA to take account of the unique challenges that EPA faces in managing the water quality impacts of stormwater discharges. Pub. L. No. 100-4, 101 Stat. 69 (33 U.S.C. 1342(p)).

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[1] The Silvicultural Rule reads as follows:

> *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.

40 C.F.R. 122.27(b)(1).

CWA Section 402(p), which addresses "discharges composed entirely of stormwater," established a temporary moratorium on NPDES permit requirements for such discharges, with the exception of five categories of discharges listed in 33 U.S.C. 1342(p)(2). Section 402(p) also required EPA to establish regulations setting forth permit-application requirements for specified categories of stormwater point-source discharges and to conduct studies to determine what other discharges should be regulated to protect water quality. The statute contemplated that those regulations would be promulgated through a phased approach, the first commonly referred to as Phase I and the second as Phase II. 33 U.S.C. 1342(p)(4)(A) and (B).

Phase I covers the five enumerated categories of stormwater discharges, including stormwater discharges "associated with industrial activity." 33 U.S.C. 1342(p)(2)(B). The 1987 amendment requires NPDES permits for those discharges and directs EPA to regulate them accordingly. 33 U.S.C. 1342(p)(3) and (4)(A). The CWA does not define the term stormwater discharge "associated with industrial activity." In 1990, EPA promulgated Phase I regulations that define that term as

> the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from * * * immediate access roads * * * used or traveled by carriers

> of raw materials, manufactured products, waste material, or by-products used or created by the facility[.] * * * The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):
>
> * * *
>
> (ii) Facilities classified as Standard Industrial Classifications 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373.

40 C.F.R. 122.26(b)(14).[2]

Phase II covers stormwater discharges other than those enumerated in 33 U.S.C. 1342(p)(2). The 1987 amendment authorizes EPA to designate, as part of Phase II, any additional stormwater discharges "to be regulated to protect water quality." 33 U.S.C. 1342(p)(5) and (6). Under Section 402(p)(6), EPA must "establish a comprehensive program" that "shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines." 33 U.S.C. 1342(p)(6). The program "may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." *Ibid.* EPA is authorized to require NPDES permits for Phase II discharges, but it is not required to do so. *Ibid.*

In 1999, EPA promulgated regulations that designated two categories of stormwater point-source discharges (neither of which is relevant to this case) for Phase II

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[2] The regulation incorporates by reference the enumerated Standard Industrial Classification (SIC) codes. "Logging" is a subcategory (2411) of SIC code 24. *Standard Industrial Classifications Manual*, Div. D, Major Group 24, Industry Group 241, 2411 Logging, available at http://www.osha.gov/pls/imis/sic_manual.html.

regulation under Section 402(p)(6). 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999) (codified in pertinent part at 40 C.F.R. 122.26(a)(9)(i)). EPA also reserved the authority to designate additional discharges for Phase II regulation at a later date. *Ibid.*[3]

2. Respondent commenced this action under the CWA's citizen-suit provision, 33 U.S.C. 1365. Respondent alleged that stormwater discharges associated with two logging roads in Oregon violate the Act because the roads at issue collect, channel, and discharge stormwater runoff to waters of the United States—without NPDES permits—via ditches, pipes, and culverts. II J.A. 2-3, 7-9 (First Amended Complaint).

Petitioners are state officials and private timber companies who control the relevant logging roads and were named as defendants in this suit. Supported by the United States as amicus curiae, petitioners moved to dismiss the complaint for failure to state a claim. The district court granted the motion. The court held that, under EPA's Silvicultural Rule, 40 C.F.R. 122.27(b)(1), discharges from logging roads were not required to have

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[3] In 2003, the Ninth Circuit remanded to EPA the question whether to regulate stormwater discharges from forest roads under Phase II. See *Environmental Def. Ctr.* v. *EPA*, 344 F.3d 832, 863, cert. denied, 541 U.S. 1085 (2004). EPA continues to review available information on the water-quality impacts of stormwater discharges from forest roads, including logging roads, as well as existing practices to control these discharges. On May 23, 2012, EPA announced that it "is considering designating a subset of stormwater discharges from forest roads for appropriate action" under the agency's Phase II rulemaking authority. *Notice of Intent to Revise Stormwater Regulations to Specify that an NPDES Permit is not Required for Stormwater Discharges from Logging Roads and to Seek Comment on Approaches for Addressing Water Quality Impacts from Forest Road Discharges*, 77 Fed. Reg. 30,473, 30,479.

NPDES permits because EPA had categorized natural runoff from those roads and other sources as "non-point source" pollution. Pet. App. 53-77.[4]

3. The court of appeals reversed. Pet. App. 1-52.[5]

a. As in the district court, the government filed an amicus brief arguing that, under EPA's Silvicultural Rule, all precipitation-driven runoff from logging roads is not currently regulated under the NPDES permitting program, even if it flows through a ditch, channel, or culvert before being discharged into waters of the United States. See I J.A. 27, 39. The court of appeals rejected that interpretation of the regulation. Pet. App. 34-37. The court stated that "there are two possible readings of the Silvicultural Rule," and it acknowledged that the interpretation advanced in the government's amicus brief "reflects the intent of EPA in adopting the Rule." *Id.* at 36. The court concluded, however, that an alternative reading of the rule was preferable because it would "allow [the court] to construe the Rule to be consistent with the statute," in particular, the CWA's definition of "point source." *Id.* at 37. The court held that the Silvicultural Rule does not exempt from NPDES requirements stormwater runoff from logging roads that is systemically collected and channeled through man-made ditches and culverts before being discharged into waters of the United States. *Ibid.*

b. Petitioners and the government further argued that, even if such channeled runoff from logging roads

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[4] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 11-338.

[5] The initial court of appeals opinion was published at 617 F.3d 1176, but the discussion in this brief cites the superseding opinion, which was published at 640 F.3d 1063 and is reprinted in the appendix to the certiorari petition.

constitutes a "point source" discharge, such discharges are not subject to NPDES permitting requirements under EPA's stormwater regulations promulgated pursuant to 33 U.S.C. 1342(p). Pet. App. 37-48. Petitioners and the government contended, in particular, that the discharges at issue here are not "associated with industrial activity" as EPA has defined that term. See *id.* at 44-47; 40 C.F.R. 122.26(b)(14). The court of appeals rejected that understanding of EPA's regulatory definition. The court found it "undisputed that 'logging,' which is covered by SIC [Standard Industrial Classification] 2411 (part of SIC 24), is an 'industrial activity.'" Pet. App. 44-45. The court construed the regulation's reference to "immediate access roads"—defined in EPA's Phase I stormwater rule preamble to mean "roads which are exclusively or primarily dedicated for use by the industrial facility"—as covering the roads at issue here. *Id.* at 45-47.

4. a. Petitioners filed petitions for rehearing in the court of appeals. The court of appeals thereafter ordered a response and posed two threshold questions: (1) "Can a suit challenging EPA's interpretation of its regulations implementing the Clean Water Act's permitting requirements be brought under the Act's citizen suit provision, 33 U.S.C. § 1365(a)?" (2) "Must a suit challenging EPA's decision to exempt the discharge of a pollutant from the Clean Water Act's permitting requirements be brought under the Act's agency review provision, 33 U.S.C. § 1369(b)?" I J.A. 7 (Docket entry No. 106).

Section 1369(b) authorizes private parties to obtain direct court of appeals review of certain EPA actions, including actions taken in "promulgating any effluent limitation or other limitation under section 1311" or "in

issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(E) and (F). EPA's NPDES regulations are generally subject to immediate appellate review under that provision. See, *e.g.*, *National Cotton Council of Am.* v. *EPA*, 553 F.3d 927, 932-933 (6th Cir. 2009), cert. denied, 130 S. Ct. 1505 (2010); *NRDC* v. *EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992); *NRDC* v. *EPA*, 673 F.2d 400, 404-406 (D.C. Cir.), cert. denied, 459 U.S. 879 (1982) (citing *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977)). Such review must be sought within 120 days after the relevant EPA action, unless a challenge is "based solely on grounds which arose after such 120th day." 33 U.S.C. 1369(b)(1). Any action "with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2).

In response to the court of appeals' questions, the United States filed another amicus brief. The government expressed the view that, although Section 1369(b)(2) would preclude the court in a Section 1365(a) citizen suit from invalidating the EPA regulations implicated by this case, Section 1369(b)(2) did not necessarily preclude the court from interpreting those regulations differently than EPA had interpreted them. I J.A. 55-57. The government further argued, however, that the court was required to defer to the agency's interpretation so long as that interpretation was not "plainly erroneous or inconsistent with the regulation." I J.A. 58 (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

The court of appeals denied rehearing and issued a superseding panel opinion. Pet. App. 1-52. In a new section entitled "Subject Matter Jurisdiction," the court held that Section 1369(b) "does not bar a citizen suit

challenging EPA's Silvicultural Rule interpretation first adopted in its initial amicus brief in this case." Pet. App. 8-10. The court adhered to the remainder of its opinion.

SUMMARY OF ARGUMENT

I. The courts below properly exercised jurisdiction over this action pursuant to the CWA's citizen-suit provision. Because the EPA regulations relevant to this case (the Silvicultural Rule and the Phase I industrial stormwater regulation) could have been challenged in a court of appeals under 33 U.S.C. 1369(b) at the time they were promulgated, they are not subject to judicial review in this citizen suit brought under 33 U.S.C. 1365(a). The court of appeals did not declare either of those rules invalid, however, but rather rejected the interpretations of those rules set forth in the government's amicus brief. Although the court should have deferred to EPA's reasonable construction of its own rules, it did not err in entertaining this citizen enforcement suit.

II. The court of appeals misinterpreted both of the EPA regulations at issue in this case. Properly construed, each of those rules independently dictates the conclusion that NPDES permits are not required for the discharges at issue.

A. EPA's construction of its own rule is "controlling" unless that construction is "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). That principle applies even where, as here, the court is precluded from determining whether the regulation so construed is consistent with the governing statute. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 418-419 (1945).

B. The CWA requires NPDES permits for stormwater discharges "associated with industrial activity," 33

U.S.C. 1342(p)(2)(B), but the Act does not define that term. EPA has construed its Phase I industrial stormwater regulation not to require such permits for stormwater discharges from logging roads. That position reflects a reasonable construction of the regulation's text. The Phase I regulation refers to discharges from "[f]acilities classified as Standard Industrial Classification[] 24," which include logging establishments. 40 C.F.R. 122.26(b)(14)(ii). EPA has construed that reference, however, as encompassing only discharges from the four subcategories of silvicultural facilities it had already identified as point sources in the Silvicultural Rule, which do not include runoff from logging roads. Because the stormwater discharges at issue in this case are not covered by EPA's Phase I regulations, the judgment of the court of appeals should be reversed, without regard to whether those discharges are "point source" discharges under the Act and the Silvicultural Rule.

C. Because the Phase I regulation (properly construed) provides a sound basis for concluding that petitioners were not required to obtain NPDES permits, the Court need not determine whether the Silvicultural Rule also compels the same result. If the Court reaches the issue, however, it should sustain EPA's interpretation of the Silvicultural Rule, under which no permit is required for "natural runoff" from logging roads. The stormwater discharges at issue here do not implicate any of the four types of silvicultural facilities ("rock crushing, gravel washing, log sorting, [and] log storage facilities") that the rule specifically identifies as "[s]ilvicultural point source[s]." 40 C.F.R. 122.27(b)(1). And while the Silvicultural Rule does not state explicitly whether its reference to "natural runoff" includes systematically

channeled runoff, EPA's resolution of that ambiguity is entitled to judicial deference under *Auer*.

The court of appeals rejected EPA's reading on the ground that it would render the Silvicultural Rule inconsistent with the CWA's definition of "point source." *Seminole Rock*, however, precludes that sort of inquiry under the circumstances presented here because EPA's interpretation of its Rule is controlling. In any event, the CWA's definition of "point source," 33 U.S.C. 1362(14), affords EPA "room here for some exclusion by interpretation," particularly with respect to silvicultural sources. *NRDC* v. *Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

ARGUMENT

The 1987 CWA amendments reflect Congress's determination that, although point-source stormwater discharges can significantly affect the quality of navigable waters, a blanket requirement of NPDES permits for all such discharges was an unwieldy regulatory tool. Congress accordingly enacted a more nuanced scheme that was specifically designed for stormwater. The essence of that scheme was to identify limited categories of stormwater discharges for which NPDES permits would still be required by statute, while giving EPA broad discretion to devise appropriate measures for addressing stormwater discharges outside the defined categories.

The court of appeals' decision in this case depends on the proposition that the discharges at issue here were "associated with industrial activity" within the meaning of an EPA regulation that implements the 1987 CWA amendment, specifically 33 U.S.C. 1342(p)(2)(B). The court did not hold that the statutory language compels that conclusion, but instead interpreted the terms of the EPA rule itself. The court reached that conclusion de-

spite the government's unequivocal explanation, in its amicus brief in the Ninth Circuit, that EPA holds a contrary view about the meaning of the regulation. If this Court rejects that aspect of the court of appeals' analysis, and holds that the pertinent discharges are not "associated with industrial activity" for purposes of Section 1342(p)(2)(B) and EPA's Phase I regulations, the case will be at an end. It will then be unnecessary for the Court to decide whether, under the Act and the Silvicultural Rule, EPA has discretion to determine which discharges of stormwater from logging roads are point-source discharges.

For two basic reasons, a determination that petitioners' discharges are not "associated with industrial activity" would be the soundest and most straightforward way of deciding this case. First, Section 1342(p) reflects Congress's more recent, and more specific, direction to EPA regarding control of stormwater discharges. The Silvicultural Rule, by contrast, was promulgated prior to the 1987 CWA amendments under a statutory regime that required NPDES permits for all point-source discharges of pollutants, including discharges of stormwater. That regime, which fueled multiple agency efforts (including the Silvicultural Rule) to accommodate the CWA's broad application in light of the practical difficulties of including all potentially covered sources, has effectively been superseded with respect to discharges composed entirely of stormwater. See pp. 3-7, *supra*.[6]

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[6] In implementing its responsibility to protect the Nation's interest in maintaining and improving the quality of its waters, EPA in its May 23, 2012, Federal Register notice stated that it is considering the possibility of regulating a subset of stormwater discharges from forest roads, through means other than NPDES permits, pursuant to its

Second, determining that NPDES permits are not required pursuant to the industrial stormwater regulation would obviate the need for the Court to resolve the difficult question, which arises only with respect to the Silvicultural Rule, of whether a court may reject EPA's interpretation of its rule on the ground that the interpretation would be inconsistent with the Act. Petitioners contend that the court of appeals exceeded the limits imposed by 33 U.S.C. 1369(b)(2) because its decision implicitly invalidated the pertinent EPA rules. With respect to EPA's regulatory definition of "discharge associated with industrial activity," that argument clearly lacks merit. Although the court of appeals erred in failing to defer to the agency's construction of that rule, the court's contrary interpretation cannot be viewed as anything other than an interpretation of the rule. With respect to the Silvicultural Rule, however, the line between interpretation and invalidation is less clear, since the court of appeals' stated reason for rejecting EPA's construction of that rule was that the rule, as EPA construed it, would be inconsistent with the CWA. By resolving this case on the basis of the Phase I stormwater regulation, the Court can avoid the issue of "statutory avoidance" raised by the interplay between Section 1369(b)(2) and various principles of regulatory interpretation.

I. THE CWA CONFERS JURISDICTION OVER THIS CITIZEN SUIT

The CWA's citizen-suit provision authorizes private citizens to bring enforcement actions against any person "who is alleged to be in violation of (A) an effluent

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Section 402(p)(6) stormwater rulemaking authority. 77 Fed. Reg. at 30,479.

standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. 1365(a)(1). The violations that are redressable through a citizen suit include, *inter alia*, discharges of pollutants into waters of the United States without an NPDES permit. See 33 U.S.C. 1365(f) (defining the term "effluent standard or limitation under this chapter"). Section 1369(b), by contrast, provides for immediate review by a court of appeals of various EPA actions, including the promulgation of NPDES regulations. 33 U.S.C. 1369(b)(1); see pp. 9-10, *supra*.[7] A review proceeding under Section

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[7] Section 1369(b)(1) authorizes direct court of appeals review of "the Administrator's action * * * (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316 or 1345 of [the Act], [or] (F) in issuing or denying any permit under section 1342 of [the Act]." 33 U.S.C. 1369(b)(1)(E) and (F). In *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), the Court construed that provision to authorize review of EPA's industry-wide regulations establishing uniform effluent limitations for particular categories of plants. See *id.* at 115, 136. The Court explained that a contrary result "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [CWA Section 402] but would have no power of direct review of the basic regulations governing those individual actions." *Id.* at 136. Based on *Train*, courts of appeals have understood Section 1369(b)(1)(E) to authorize direct review of NPDES permitting regulations, including EPA's consolidated permitting regulations, which set forth "a complex set of procedures for issuing or denying NPDES permits." *NRDC* v. *EPA*, 673 F.2d 400, 402 (D.C. Cir.), cert. denied, 459 U.S. 879 (1982). This Court also has interpreted Section 1369(b)(1)(F) to encompass actions that are "functionally similar" to the issuance or denial of an NPDES permit. *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196 (1980). Courts of appeals have since relied on that provision to review NPDES permitting regulations. See *National Cotton Council of Am.* v. *EPA*,

1369(b)(1) must be commenced within 120 days of the challenged action, unless the basis for the suit arises after that period. *Ibid.*

Section 1365(a) clearly confers jurisdiction over this citizen suit, in which respondent alleges CWA violations arising from petitioners' discharges into waters of the United States. See 33 U.S.C. 1365(a) ("The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce * * * an effluent standard or limitation."). Although petitioners purport to challenge the court of appeals' "jurisdiction," their challenge, properly conceived, does not go to that court's jurisdiction. Rather, the disputed issue here concerns the range of arguments the courts below could properly consider in determining whether petitioners were liable under the Act for discharges of pollutants without an NPDES permit.

Any EPA action that could have been challenged under Section 1369(b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2). Because a citizen suit is a "civil * * * proceeding for enforcement" within the meaning of that provision, the court in such a suit may not disregard pertinent EPA regulations on the ground that they are inconsistent with the statute, since that would constitute the "judicial review" of EPA action that Section 1369(b)(2) forbids. Cf. *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 581 (2007) (explaining that a lower court's "implicit invalidation" of a pertinent EPA rule was "a form of judicial review implicating" an analogous limitation of review under the Clean Air Act). By contrast, courts in CWA citizen suits often must *in-*

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553 F.3d 927, 932-933 (6th Cir. 2009), cert. denied, 130 S. Ct. 1505 (2010); *NRDC* v. *EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992).

terpret applicable EPA regulations in order to determine whether the defendant has violated any "effluent standard or limitation."

Under that rubric, the court of appeals' interpretation of EPA's "associated with industrial activity" regulation raises no jurisdictional concern under Section 1369(b)(2). As we explain below (pp. 23-27, *infra*), the court's interpretation of that rule is *erroneous*, both because it is contrary to the most natural reading of the regulatory text, and because the court failed to give appropriate deference to EPA's interpretation of its own rule. Nothing in the court's analysis suggests, however, that the decision was anything other than an *interpretation* (as opposed to invalidation) of the "associated with industrial activity" rule.

The court of appeals' treatment of the Silvicultural Rule presents a closer question. The court adopted an interpretation of that rule that "does not reflect the intent of EPA," based on a determination that the court's own construction "would allow [the court] to construe the Rule to be consistent with the statute." Pet. App. 37. Petitioners contend that the court of appeals' ruling amounts to an implicit invalidation of the rule, which Section 1369(b)(2) bars. See 11-338 Pet. Br. 38-39; 11-347 Pet. Br. 52-54. This Court's decision in *Duke Energy* indicates, however, that Section 1369(b)(2) generally does not preclude the court in a CWA citizen suit from invoking what might be termed "statutory avoidance" principles in resolving a regulatory ambiguity.

The Court in *Duke Energy* distinguished, for purposes of an analogous Clean Air Act judicial-review provision, "between a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals's view of the statute, and a determina-

tion that the regulation as written is invalid." 549 U.S. at 573. The present case falls into the former category. The Silvicultural Rule's reference to "natural runoff" associated with logging roads neither clearly encompasses nor clearly excludes the sort of channeled runoff that is at issue in this case. The court of appeals' construction therefore qualifies as a "purposeful but permissible reading of the" Silvicultural Rule, rather than a de facto invalidation. Compare *Duke Energy*, 549 U.S. at 581 (where court of appeals' interpretation was "doomed" by the "text of the [pertinent] regulations," court's decision constituted "an implicit invalidation of those regulations").

The question of the court of appeals' treatment of the Silvicultural Rule is further complicated by the fact that, in choosing an interpretation the court believed necessary to render the rule consistent with the statute, the court of appeals rejected EPA's own construction of that rule as set forth in the government's amicus brief. As we explain below, the court of appeals erred in rejecting EPA's construction of the Silvicultural Rule. That error, however, is properly viewed as a misapplication of general administrative-law principles rather than as a violation of Section 1369(b)(2). *Duke Energy* suggests that the court of appeals did not violate Section 1369(b)(2) by engaging in statutory avoidance, but *Seminole Rock* precluded the court from rejecting EPA's interpretation of the Silvicultural Rule on the ground that it would conflict with the Act. See pp. 21-22, 28-30, *infra*.

II. THE COURT OF APPEALS ERRED IN FAILING TO DEFER TO EPA'S INTERPRETATION OF ITS REGULATIONS

Two independent rationales support the district court's conclusion that NPDES permits are not required

for discharges of systematically collected and channeled runoff from logging roads. First, under EPA's interpretation of its Phase I stormwater regulations, the discharges at issue here are not "associated with industrial activity." Second, under EPA's interpretation of its Silvicultural Rule, such discharges do not constitute "point source" discharges. The court of appeals identified no sound basis for rejecting the agency's definitive interpretations of its own rules.

A. An Agency's Interpretation Of Its Regulation Is Controlling Unless It Conflicts With The Text Or Structure Of The Regulation

Where (as here) resolution of a citizen suit turns on the interpretation of ambiguous regulatory terms, a court must defer to the agency's interpretation of its own rule, as presented in an amicus brief, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))); see, *e.g.*, *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2265 (2011) ("The FCC as *amicus curiae* has advanced a reasonable interpretation of its regulations, and we defer to its views."). The *Auer* inquiry focuses solely on the regulatory text and structure. If an agency's interpretation is not "plainly erroneous or inconsistent with the regulation," the agency's interpretation of its regulation becomes "controlling." *Auer*, 519 U.S. at 461; see, *e.g.*, *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 278 (2009) (finding that EPA's interpretation of its regulations was "not plainly erroneous or inconsistent with the regulations, and so we ac-

cept it as correct") (internal quotation marks and brackets omitted).

After a court defers to the agency's linguistically plausible construction of its own regulation, it typically may then consider any contention that the regulation, so construed, is inconsistent with the governing statute. See *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977) ("Since [the agency's] interpretation is not plainly inconsistent with the wording of the regulations, we accept the Government's reading of those regulations as correct. This, however, does not end our inquiry. For regulations, in order to be valid, must be consistent with the statute under which they are promulgated."). Under some judicial-review provisions, however, a court that is authorized to interpret an agency regulation is barred from passing on the regulation's validity. In that circumstance, the court must assess the propriety of the agency's interpretation based on the *Auer* standard alone, *i.e.*, by determining whether the agency's construction conflicts with the text and structure of the regulation. The court may not reject an agency interpretation that would otherwise be entitled to deference based on the court's view that a different construction is necessary to prevent a conflict with the governing statute.

In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the seminal precursor to *Auer*, the Court applied that framework in interpreting regulations promulgated by the Office of Price Administration under the Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23. 325 U.S. at 411. The Court announced the standard, later reiterated in *Auer*, that an agency's interpretation is controlling "unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. The

Court explained that, in construing the pertinent regulation, its "*only tools*, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator." *Ibid.* (emphasis added). After affording the administrative interpretation controlling weight under that standard, the Court did not address the statutory or constitutional validity of the regulation so construed. See *ibid.* (stating that the "only problem" before the Court was "to discover the meaning of" particular regulatory provisions, while noting that "[t]he legality of the result reached by this process * * * is quite a different matter"). Rather, the Court held that it lacked authority to decide that separate question because, under the applicable statutory regime, questions of regulatory validity were required to be presented in the first instance to the Emergency Court of Appeals. *Id.* at 418-419.

The same principle applies here. In order to adjudicate respondent's citizen suit against petitioners, the court of appeals was required "to discover the meaning," *Seminole Rock*, 325 U.S. at 414, of the pertinent EPA regulations. If EPA had not proffered an interpretation of those regulations that was entitled to *Auer* deference, the court would have been required to construe the rules de novo, and it might have adopted "a purposeful but permissible reading of the regulation adopted to bring it into harmony with the [court's] view of the statute." *Duke Energy*, 549 U.S. at 573. The court could not, however, permissibly invoke "statutory avoidance" principles as a ground for rejecting an agency interpretation of the regulation that satisfied the criteria for *Auer* deference.[8]

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[8] In its brief in opposition to the petitions for certiorari, respondent disavowed any argument that either the Silvicultural Rule or the

B. The Court Of Appeals Erred In Not Deferring To EPA's View That Channeled Runoff From Logging Roads Does Not Give Rise To A Stormwater Discharge "Associated With Industrial Activity"

The 1987 CWA amendment established an exception, with respect to stormwater discharges, to the Act's general requirement that point-source discharges of pollutants to waters of the United States require NPDES permits. See 33 U.S.C. 1342(p). The Act continues to require NPDES permits for stormwater discharges in five enumerated categories, 33 U.S.C. 1342(p)(2), including those "associated with industrial activity," 33 U.S.C. 1342(p)(2)(B). Pursuant to Section 402(p)(6), EPA is authorized, but not required, to designate additional sources of stormwater for regulation, either through NPDES permits or through other regulatory mechanisms.

The Act does not define the term "associated with industrial activity," but the 1987 amendment required EPA to promulgate regulations relating to industrial and other Phase I stormwater discharges. 33 U.S.C. 1342(p)(4)(A). In 1990, EPA issued Phase I regulations that, *inter alia*, define "storm water discharge associated with industrial activity" to mean

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Phase I regulation violates the CWA, and reaffirmed that it is not seeking to invalidate either regulation in this litigation. Br. in Opp. 20-21. This case therefore does not present the question whether, under the CWA's judicial-review provisions, clarification of EPA's interpretation of its preexisting rule can provide a new opportunity for review of the rule itself. See 33 U.S.C. 1369(b)(1) (requiring application for review within 120 days of the regulation's promulgation, unless "such application is based solely on grounds which arose after such 120th day"); 33 U.S.C. 1369(b)(2) (precluding review in enforcement proceedings of EPA actions "with respect to which review could have been obtained" under Section 1369(b)(1)).

> the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from * * * immediate access roads * * * used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility.

40 C.F.R. 122.26(b)(14). To identify the categories of "facilities" engaged in "industrial activity," EPA's regulation further incorporates by reference Standard Industrial Classification (SIC) codes, including SIC code 24, of which "logging" is subcategory 2411. 40 C.F.R. 122.26(b)(14)(ii).

As explained above (pp. 20-22, *supra*), EPA's interpretation of its regulation defining "associated with industrial activity" is controlling unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Relying primarily on the regulation's reference to SIC code 2411, the court of appeals construed EPA's rule to treat the discharges at issue here as discharges "associated with industrial activity." Pet. App. 44-47. The government's amicus brief explained, however, that "EPA primarily referenced this SIC code to regulate traditional *industrial* sources such as sawmills." I J.A. 42. That understanding is consistent with EPA's explanation, at the time the rule was promulgated, that "[e]stablishments identified under SIC 24 (except 2434) are engaged in operating sawmills, planing mills and other mills engaged in producing lum-

ber and wood basic materials." 55 Fed. Reg. 47,990, 48,008 (Nov. 16, 1990).

The government's amicus brief further explained that "[b]y not excluding SIC code 2411 (the logging subcategory), EPA intended to reference only the four subcategories of silvicultural facilities it had already defined as point sources in" the Silvicultural Rule—*i.e.*, rock crushing, gravel washing, log sorting, and log storage. I J.A. 43.[9] Those facilities are more closely associated with traditional industrial activities than are logging roads, which are often used for recreational purposes rather than as "immediate access roads" to those facilities. I J.A. 44. EPA's interpretation is also consistent with the terms of SIC code 2411, which defines "logging" facilities as "*establishments* primarily engaged in cutting timber and in producing . . . primary forest or

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[9] That understanding is buttressed by the fact that EPA's definition of "storm water discharge associated with industrial activity" expressly exempts activities that are "excluded from the NPDES program under this part 122," 40 C.F.R. 122.26(b)(14), including under the Silvicultural Rule, 40 C.F.R. 122.27. See also 55 Fed. Reg. at 48,011 (preamble stating that EPA did not intend "to change the scope of 40 CFR 122.27 in this rulemaking," and that "'storm water discharge associated with industrial activity' does not include sources * * * which are excluded under 40 CFR 122.27"). In the preamble to the 1990 Phase I regulations, EPA stated its intent to examine the scope of the Silvicultural Rule as it related to stormwater discharges in the course of two studies required under CWA Section 402(p)(5). *Ibid.* Based on those studies, EPA promulgated the Phase II rule in 1999. That rule was challenged in *Environmental Defense Center* v. *EPA*, 344 F.3d 832, 860-863 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004), and the court of appeals remanded to EPA the question whether stormwater discharges from forest roads should have been regulated pursuant to Section 402(p)(6). That remand would have been pointless if such runoff was already regulated under Phase I pursuant to Section 402(p)(2)(B).

wood raw materials . . . in the field." Pet. App. 45 (emphasis added). Thus, while the text of the regulation might not foreclose respondent's alternative reading of the term "associated with industrial activity," EPA's interpretation of its own rule is reasonable and therefore should have been afforded *Auer* deference. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) ("While it is possible that the claimants' parsing of these impenetrable regulations would be consistent with accepted canons of construction, it is axiomatic that the Secretary's interpretation [of the regulations] need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference.") (citations omitted).

With respect to the Silvicultural Rule, the court of appeals identified the need for consistency with the governing statute as its rationale for rejecting EPA's understanding of its own regulation. See Pet. App. 36-37. With respect to the regulatory definition of "discharge associated with industrial activity," by contrast, the court did not hold that the CWA compelled its expansive construction of the rule.[10] Any such contention would be

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[10] Although the State petitioners contend otherwise (11-338 Pet. Br. 40-42), this aspect of the court of appeals' opinion is best read as resting on the text of the industrial stormwater rule, not on any view that CWA Section 402(p) compelled EPA to treat forest-road discharges as "associated with industrial activity." See, *e.g.*, Pet. App. 46 ("The [Phase I regulation's] definition of a 'facility' engaging in industrial activity' is very broad."); *id.* at 47 (reasoning that because EPA considered logging activities to be "industrial in nature" by virtue of the *regulation's* reference to the logging SIC code, EPA could not exempt such activities from NPDES permits); see also 11-347 Pet. Br. 39, 43 (describing court of appeals' rejection of EPA's interpretation of industrial stormwater rule as "the product of a myopic focus on isolated snippets of regulatory language" and as "second-guessing

implausible. As noted above, the 1987 amendment did not define the term "associated with industrial activity," but rather directed EPA to promulgate regulations implementing that provision. See 33 U.S.C. 1342(p)(4)(A). That language gives EPA significant discretion to define both what will count as "industrial activity," and what stormwater discharges bear a sufficiently close nexus to such activity as to be "associated with" it.

Whatever the precise limits of that discretion, the statutory term "discharge associated with industrial activity" does not ineluctably cover channeled runoff from all logging roads. Thus, even if the desire to avoid a conflict with the governing statute could provide a sound basis for rejecting an agency interpretation that would otherwise be entitled to deference under *Seminole Rock* and *Auer* (but see pp. 20-22, *supra*), any such justification would be absent here. Under these circumstances, the Ninth Circuit's refusal to defer to EPA's interpretation of its own regulatory definition is contrary to basic administrative-law principles.[11]

EPA's expert judgment concerning its own regulation"). That discussion stands in sharp contrast to the court of appeals' discussion of the Silvicultural Rule, in which it explicitly characterized EPA's interpretation as "inconsistent with [CWA] § 502(14)." Pet. App. 37.

[11] In response to the Ninth Circuit's decision, EPA issued a notice in the Federal Register indicating its intent "to propose revisions to its Phase I stormwater regulations (40 C.F.R. 122.26) to specify that stormwater discharges from logging roads are not included in the definition of 'storm water discharge associated with industrial activity.'" 77 Fed. Reg. at 30,474. EPA thus has expressed its intent to amend Section 122.26(b) to respond to the Ninth Circuit's contrary reading of the regulation by making explicit the interpretation advanced in the government's 2007 amicus brief. On September 4, 2012, EPA published a notice of proposed rulemaking to that effect. *Notice of Proposed Revisions to Stormwater Regulations to Clarify that an NPDES Permit is not Required for Stormwater Discharges from*

C. The Court Of Appeals Erred In Not Deferring To The EPA's Interpretation Of The Silvicultural Rule That Runoff From Logging Roads Constitutes Nonpoint-Source Pollution

Properly construed, the Phase I regulation provides an adequate and independent basis to conclude that petitioners were not required to obtain an NPDES permit for the alleged discharges at issue here. Accordingly, the Court need not decide whether the Silvicultural Rule—promulgated under a regulatory framework predating the 1987 stormwater amendment—also excludes such discharges from the NPDES permitting scheme. If the Court reaches the question, however, it should reverse the court of appeals' conclusion that stormwater runoff from logging roads that is collected and channeled by a system of ditches and culverts requires a permit under the Silvicultural Rule.

The Silvicultural Rule specifically identifies four categories of silvicultural facilities ("rock crushing, gravel washing, log sorting, [and] log storage facilities") as "[s]ilvicultural point source[s]." 40 C.F.R. 122.27(b)(1). Discharges of pollutants from those enumerated industrial activities are different in kind from stormwater discharges associated with precipitation-driven runoff from logging roads. The Silvicultural Rule further provides that the term "[s]ilvicultural point source" does not include "harvesting operations * * * or road construction and maintenance from which there is natural

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Logging Roads, 77 Fed. Reg. __ (forthcoming), available at http://www.ofr.gov/OFRUpload/OFRData/2012-21432_PI.pdf. EPA's proposed regulatory approach, if and when finalized, effectively would render moot the court of appeals' conclusion that such discharges are subject to NPDES permitting requirements under the current regulatory scheme.

runoff." *Ibid.* Although the rule does not specifically confirm that the reference to "natural runoff" encompasses systematically channeled runoff, neither does it suggest that such runoff should be treated as a "point source" discharge.

The government unequivocally expressed in its amicus brief EPA's view that, under the Silvicultural Rule, channeled "natural runoff" from logging roads does not require a permit. That brief explained that "the term 'natural runoff' in the silvicultural rule categorically excludes [from the definition of silvicultural point source] all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts." I J.A. 39. EPA's interpretation of its Silvicultural Rule was not "plainly erroneous or inconsistent with the regulation"; indeed, it was the more linguistically plausible reading of the rule. The court of appeals therefore should have deferred under *Auer* to that interpretation.

The court of appeals did not disagree that EPA's reading was consistent with the terms of the Silvicultural Rule. Rather, it rejected EPA's reading on the ground that the agency interpretation would bring the rule into conflict with the CWA's definition of "point source." Pet. App. 36-37. That mode of analysis was erroneous. As discussed above (pp. 20-22, *supra*), if an agency has offered a definitive interpretation of its own regulation that is otherwise entitled to deference under *Seminole Rock* and *Auer*, a court may not adopt a different interpretation based on principles of "statutory avoidance." That principle applies even when the pertinent judicial-review scheme prevents the court from taking what would ordinarily be the logical next step of determining whether the regulation, as construed by the agency, is

consistent with the governing statute. See *Seminole Rock*, 325 U.S. at 414, 418-419.[12]

In any event, the CWA does not compel the court of appeals' conclusion that the discharges at issue required a permit. Just as a court must defer under *Seminole Rock* and *Auer* to an agency's reasonable construction of its own regulation, a court must defer to EPA's regulatory interpretation of an ambiguous CWA provision unless

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[12] The court of appeals' opinion, as well as the government's amicus brief at the rehearing stage, relied in part on when EPA first announced its official interpretation of the Silvicultural Rule as excluding systematically channeled runoff from logging roads from NPDES permit requirements. See Pet. App. 9-10; I J.A. 59-60 & n.5. The timing is not clear: although the government had previously contended that EPA's interpretation dated back to 1976, it argued on rehearing that EPA's interpretation was first articulated during this litigation. Compare I J.A. 33-34 with I J.A. 59-60 & n.5. That divergence arises from respondent's emphasis, as the litigation developed, on the ambiguous term "natural runoff," which was added to the Silvicultural Rule in 1980. 45 Fed. Reg. 33,290, 33,447 (May 19, 1980). The rule itself does not specify whether runoff that is systemically conveyed by channels, ditches, or culverts is "natural" (thereby constituting nonpoint-source pollution), and the EPA's pre-2007 written statements did not definitively resolve that specific issue.

On further reflection, however, the timing question is irrelevant to the resolution of this case. Even assuming that EPA's interpretation was first announced during this litigation, the court of appeals could not properly invoke principles of "statutory avoidance" to reject an agency interpretation of the Silvicultural Rule because that would be a misapplication of *Auer* principles. Quite apart from the restrictions imposed by Section 1369(b)(2) on "judicial review" of EPA regulations, the background rule of administrative law set forth in *Seminole Rock* foreclosed the court's approach. See pp. 20-23, *supra*. That is, a court can never reject an agency's interpretation of a regulation that is consistent with the regulation's text and structure, and then substitute the court's own interpretation of the regulation that it views as more consistent with the statute.

the statute dictates a different interpretation. See *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (citing *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984)). The CWA's definition of "point source," 33 U.S.C. 1362(14), gives EPA meaningful discretion in distinguishing between point and non-point sources. "[T]he concept of a 'discrete conveyance'" in the statutory definition, for example, "suggests that there is room here for some exclusion by interpretation." *NRDC* v. *Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977); see *id.* at 1382 ("[T]he power to define point and nonpoint sources is vested in EPA and should be reviewed by the court only after opportunity for full agency review and examination.") (citation omitted); see also *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002); *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982). That is particularly true with respect to silvicultural sources of pollution. See *Costle*, 568 F.2d at 1377 (noting "question, to what extent point sources are involved in * * * silvicultural * * * runoff"); *NRDC* v. *Train*, 396 F. Supp. 1393, 1401 (D.D.C. 1975) ("Congress intended for the agency to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources."), aff'd, 568 F.2d 1369 (D.C. Cir. 1977).[13] Thus, read in light of the Act as a whole, the CWA's definition of "point source" does not foreclose EPA from determining that

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[13] The CWA elsewhere refers to silvicultural activities as generating pollution from nonpoint sources. See 33 U.S.C. 1288(b)(2)(F) (referring to "agriculturally and silviculturally related nonpoint sources of pollution"); 33 U.S.C. 1314(f)(A) (addressing identification and control of "nonpoint sources of pollution" from "agricultural and silvicultural activities, including runoff from fields and crop and forest lands").

channeled stormwater runoff from logging roads should be treated as nonpoint-source discharges.

It should be acknowledged, however, that EPA's latitude to distinguish between point-source and nonpoint-source stormwater discharges served a significantly greater practical need when the Silvicultural Rule was adopted in 1976, and amended to its present form in 1980, than it does under the current statutory scheme. Until 1987, designating particular categories of stormwater discharges as nonpoint-source discharges was EPA's only statutory mechanism for insulating them from NPDES permitting requirements. Congress recognized the shortcomings of that rigid approach, and it enacted the 1987 amendment to provide EPA a greater range of regulatory options to address the distinct issues that stormwater discharges pose. That amendment gives EPA substantial discretion to designate which stormwater discharges, other than the five categories listed in Section 402(p)(2), are subject to the Act, and to determine whether to address those discharges through means other than permits. Because EPA's regulatory definition of "discharge associated with industrial activity" is part of the agency's effort to implement that current, more nuanced statutory scheme, it represents the most appropriate ground on which to decide this case. See pp. 13-15, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 11-347

IN THE

Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., *et al.*,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION, THE NATIONAL PORK PRODUCERS COUNCIL, AND THE NATIONAL COUNCIL OF FARMER COOPERATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 11-347

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION, THE NATIONAL PORK PRODUCERS COUNCIL, AND THE NATIONAL COUNCIL OF FARMER COOPERATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The American Farm Bureau Federation (Farm Bureau), the National Pork Producers Council (NPPC), and the National Council of Farmer Cooper-

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to the brief. All parties have filed blanket *amicus* consent letters.

atives (NCFC) respectfully submit this brief as *amici curiae* in support of Petitioners.

The Farm Bureau was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing more than 6.2 million member facilities in all 50 states and Puerto Rico, the Farm Bureau maintains a membership that produces every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers. To that end, the Farm Bureau has regularly participated as *amicus curiae* in this Court in cases involving the proper scope of the permitting schemes established by the Clean Water Act. *See, e.g.*, *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012); *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007); *Rapanos* v. *United States*, 547 U.S. 715 (2006); *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

NPPC is a non-profit trade association representing the interests of pork producers throughout the United States. It serves as an advocate for reasonable legislation and regulations, develops revenue and market opportunities, and protects the livelihood of the nation's 67,000 pork producers, which it represents through 43 affiliated state associations. NPPC's mission includes representing pork producers in administrative and judicial proceedings involving national regulations and other government actions that affect the production of pork in the United States.

NCFC has been the voice of America's farmer cooperatives since 1929. NCFC members include 58 national, regional, and federated farmer cooperatives, which in turn comprise more than 2,500 local cooperatives across the United States whose member-owners include a majority of our nation's more than two million farmers and ranchers. NCFC members also include 22 state and regional councils of cooperatives. Farmer cooperatives handle, process, and market almost every type of agricultural commodity, furnish farm supplies, and provide credit and associated financial services to their farmer members. NCFC advocates on behalf of its members at the federal level to encourage a healthy public-policy environment in which farmer-owned cooperative businesses operate and thrive, and provides leadership in cooperative education. In particular, NCFC supports science-based, achievable, and affordable environmental policies and initiatives, and actively works to ensure environmental laws like the Clean Water Act are implemented accordingly. It has thus appeared before this Court as *amicus curiae* in several cases involving the Act. *See, e.g.*, *Sackett*, 132 S. Ct. 1367; *PPL Montana LLC* v. *Montana*, 132 S. Ct. 1215 (2012); *Rapanos*, 547 U.S. 715.

All *amici* have an important interest in this case because the Ninth Circuit's decision fundamentally misunderstands how farmers, ranchers, and forest landowners deal with a common problem: how to channel rainwater from their land so that crops and livestock housing do not flood and roads do not wash out. Until the panel decision below invalidating the Environmental Protection Agency's Silviculture Rule, it had been well settled that runoff from agriculture *and* silviculture was to be addressed by the

States as nonpoint sources. That makes sense. Agriculture and silviculture cover more than 1.7 *billion* acres of land in this country. To require every farmer, rancher, or forest landowner to get a federally enforceable permit simply to channel rainwater from such expanses would be virtually impossible and hopelessly ineffective. So, for nearly 40 years, all stakeholders—legislators, regulators, industry, and even environmental groups—have consistently recognized that stormwater runoff from agriculture and silviculture is a nonpoint-source form of water pollution and should be left to the expertise of State and local officials. EPA recognized as much for silviculture through rulemaking back in 1976. And Congress remedied the lack of any such regulatory interpretation for agriculture in 1987, when it expressly amended the statute to provide that a "point source * * * does not include agricultural stormwater * * *." 33 U.S.C. § 1362(14). Because the decision below conflicts with Congress's intent—as well as decades-long practices and expectations of farmers, ranchers, and forest landowners—this Court should reverse.

SUMMARY OF ARGUMENT

In 1987, Congress amended the Clean Water Act in two significant ways: First, it substantially reformulated how the Act treated stormwater runoff, 33 U.S.C. § 1342(p); second, it enacted the most robust statutory program yet for state control of unregulated nonpoint sources of stormwater: the Nonpoint Source Management Program, 33 U.S.C. § 1329. These two actions represented the culmination of a decades-long effort by Congress to establish a defined process for addressing water pollution, both inside

and outside, the Act's permitting regime. The result was that, at least with respect to stormwater, Congress drew a clear line between municipal and industrial discharges, subject to mandatory permitting requirements, and everything else (largely rural stormwater) which, absent specific EPA regulations to the contrary, would be subject to state best-management practices through the Nonpoint Source Management Program. Congress in fact categorically excluded all agricultural stormwater discharges from the Act's permitting requirements. *See* 33 U.S.C. § 1362(14). And everyone involved in the legislative process leading to the 1987 amendments—legislators, agency officials, industry representatives, and environmental groups alike—recognized that agriculture and silviculture were in the same class of activity and that stormwater from both of these sources should be treated the same.

Specifically, Congress confirmed in 1987 that agricultural and silvicultural stormwater runoff are incompatible with a national, source-by-source permitting scheme, such as the National Pollutant Discharge Elimination System (NPDES), 33 U.S.C. § 1342. Requiring farmers, ranchers, and forest landowners to get a federally enforceable permit simply for channeling stormwater from their crops, fields, farmyards, and forests is both impractical and ineffective.

The Ninth Circuit concluded otherwise with respect to silviculture because, in its view, *any* channeling of water through a manmade conveyance on forestlands—even a culvert or ditch mandated by State land-use regulations—transformed otherwise nonpoint-source forest runoff into a point-source discharge. But that rule finds support in neither the

statute nor common sense. After all, even without the intervention of man, rainwater will carve rivulets, gullies, and streams into the land that will naturally channel the same stormwater and sediment into navigable bodies of water. Any time it rains, therefore, stormwater could "discharge" from an incalculably large number of points across the 1.7 billion acres of land devoted to agricultural and silvicultural uses throughout the United States. *See* Cynthia Nickerson *et al.*, U.S. Dep't of Agric., Economic Research Serv., *Major Uses of Land in the United States, 2007* at 1 (Dec. 2011). For these reasons, categorizing each and every instance of channelized silvicultural stormwater runoff as a point-source discharge that demands a federally enforceable permit is simply not a realistic regulatory option. Instead, controlling water pollution from silvicultural (and agricultural) runoff is best left to State and local authorities, who have the expert knowledge about the industry and the local topography needed to create workable area-wide solutions for a given region. The Ninth Circuit's holding to the contrary should be reversed.

ARGUMENT

CONGRESS INTENDED STORMWATER RUNOFF FROM AGRICULTURAL AND SILVICULTURAL ACTIVITIES TO BE ADDRESSED BY THE STATES AS NONPOINT SOURCES.

In 1987, Congress provided important new directions to the States in addressing water pollution. The 1987 amendments made two fundamental changes to the Clean Water Act. First, Congress created provisions requiring the regulation of storm-

water discharges from municipal and industrial sources, but left other categories of stormwater runoff to state programs (absent subsequent EPA rulemaking to require regulation). 33 U.S.C. § 1342(p). Second, Congress added the Nonpoint Source Management Program to the Act, through which each State would establish a "management program for controlling pollution added from non-point sources to the navigable waters within the State and improving the quality of such waters." 33 U.S.C. § 1329(b)(1). These two actions, executed in tandem, reaffirmed what had long been understood by Congress, EPA, and stakeholders: agricultural and silvicultural stormwater runoff falls outside the NPDES permitting program and is instead governed by state best management practices.

A. The 1987 Stormwater Amendments Confirm That Rural Stormwater Runoff Should Be Considered A Nonpoint Source.

The Stormwater Amendments to the Clean Water Act evidence Congress's understanding that requiring permits for each and every pipe, ditch, and culvert built to channel rainwater is not a feasible or desirable option. As the Ninth Circuit previously explained: "Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the [1987 amendments to the Act], portions of which set up a new scheme for regulation of storm water runoff." *NRDC* v. *EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992). This new regulatory scheme established statutory priorities: first, for industrial and large municipal stormwater discharges, and second, for other stormwater discharges that EPA determines are adversely affecting water quality. 33 U.S.C.

1342(p)(2), (5)-(6). Notably left off the statutory list of priority stormwater discharges was traditionally unregulated rural runoff. And excluded *entirely* from the permitting scheme was agricultural stormwater discharge. 33 U.S.C. § 1362(14). This demonstrates Congress's categorical approach to stormwater pollution, which recognizes a basic dividing line: To one side are urban and industrial sources that are subject to the NPDES permitting scheme; to the other side lie non-industrial rural sources from activities such as farming and forestry, which are governed—as they always have been—by state best management practices (BMPs).

1. The Ninth Circuit's decision, which requires EPA to treat silvicultural stormwater runoff differently from agricultural stormwater runoff, runs counter to Congress's intent to treat agriculture and silviculture alike. This is first and foremost reflected in the statutory text: The Stormwater Amendments present a categorical divide between urban and industrial activities, on the one hand, and rural activities, on the other. *See* 33 U.S.C. § 1342(p) ("Municipal and industrial stormwater discharges"). These amendments confirmed EPA's longstanding view that "Congress intended the NPDES permit program to apply primarily to industrial and municipal dischargers whose effluent is relatively constant and for which the pollution reduction attainable by particular technologies may be predicted with relative accuracy." Separate Storm Sewers, 40 Fed. Reg. 56,932, 56,934 (proposed Dec. 5, 1975). In contrast, "Congress intended to regulate all rural runoff through the same mechanism, the section 208 plan-

ning process," which is administered by the States. *Id.*[2] And by "rural runoff," EPA was speaking primarily about "agriculturally- and silviculturally-related runoff." *Id.*

Indeed, by the time the 1987 amendments were under consideration by Congress, there appears to have been universal acceptance by all involved in the debates, hearings, and reports that silvicultural stormwater runoff was categorically *not* subject to the NPDES. As early as 1980, the House Subcommittee on Oversight and Review of the Committee on Public Works and Transportation reported that some of the major *nonpoint* sources of pollution were "logging operations," the "harvesting of timber," and "the building of roads." H. Rep. No. 96-71, at 20 (Dec. 31, 1980). These activities "disturb the earth and create conditions conducive to erosion," dislodging "millions of tons of sediment." *Id.* And although states and local authorities had adopted "sediment and erosion control measures," costs were preventing the widespread use of these BMPs. *Id.* at 22-23.

In the run up to the 1987 amendments, all stakeholders—legislators, agency officials, industry representatives, and even environmental groups—found a rare patch of common ground on one key point: that silvicultural stormwater runoff fell on the state side of the federal-state regulatory boundary. For in-

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[2] *See also* 40 Fed. Reg. at 56,934 ("It is EPA's position that the NPDES permit system should not be extended to runoff-generated pollution which is essentially nonpoint in nature in those rural areas where the distinction between agriculturally- and silviculturally-related runoff and storm water runoff, which happens to be channeled, is tenuous at best.").

stance, a Senate Committee Report identified the types of state-promulgated BMPs that had been developed for "silviculture areas" as including "careful road placement, *culverting*, [and] grassing of abandoned roads and skid trails." S. Rep. No. 99-50, at 35-36 (May 14, 1985) (emphasis added). This passage alone goes a long way toward gutting the Ninth Circuit's novel rule that a nonpoint source—like silviculture—morphs into a point source merely because landowners adopt the type of state-mandated practices Congress had in mind for taming the chaotic flow of stormwater and minimizing erosion and pollution.

Likewise, in a 1984 Report to Congress on *nonpoint* source pollution, EPA identified "road building, * * * harvesting and logging operations, [and] removal of trees from the harvesting site" as principal sources of silvicultural nonpoint source pollution. EPA, Publ'n No. 350R84001, *Report to Congress: Nonpoint Source Pollution in the U.S.* 2-14 (Jan. 1984).[3] The Agency observed that "[w]hen not properly planned, constructed, and maintained, roads, drainage ditches, and road cuts expose soil to erosion for long periods of time," *id.* at 2-15, and so "BMPs that are likely to prove effective include * * * [b]etter planned and constructed roads," *id.* at 2-17. But, "[a]s is the case with other nonpoint sources, no one mitigation approach is appropriate for controlling all the sediment and other pollutants associated with silvicultural operations." *Id.* at 2-17.

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[3] *Available at* http://www.epa.gov/nscep/index.html (enter title in search field).

Similarly, during hearings before the House Committee on Public Works and Transportation on a number of proposed amendments to the Clean Water Act—including the proper dividing line between point sources and nonpoint sources—the Water Pollution Control Federation (now the Water Environment Federation) identified "sediments from commercial forestry operations" as a "major source[ ] of rural nonpoint source pollution" that was "not susceptible to 'end-of-the-pipe' treatment." 4 *Legislative History of the Water Quality Act of 1987* at 1610 (Nov. 1, 1983) (4 *Legislative History*). A forest hydrologist testifying on behalf of the forestry industry on the topic of nonpoint-source pollution identified sediment from logging roads as the largest source of silvicultural pollution. *Id.* at 3050 (Nov. 16, 1983). He continued, "that's what the majority of our best management practices are directed to control. Roads are designed to reduce the amount of sediment and runoff." *Id.*

Environmental groups joined the chorus. The New England Sierra Club, for example, discussed a report "on Non-Point Source Pollution" in Massachusetts that "described the types of pollution entering each river basin in the state, and demonstrated a wide range of sources," including "agricultural runoff * * * and erosion from forest and construction sites." *Id.* at 2320 (Nov. 9, 1983). Nevertheless, the New England Sierra Club explained that it "does not at this time urge this committee to require uniform control strategies in each state." *Id.* at 2321. Instead, it "recognize[d] the wide diversity of problems in indi-

vidual states and regions and the widely different strategies needed to address them." *Id.*[4]

In sum, in our review of the entire legislative history of the 1987 amendments, we could not find a single comment suggesting that channeled silvicultural stormwater runoff was or should be controlled by the NPDES permitting program as a point-source discharge. Just the opposite. The legislative history confirms that virtually all stakeholders understood that stormwater runoff from agriculture and silviculture was, *as a category*, to be addressed as nonpoint. The Ninth Circuit's holding that forest landowners must seek a federal NPDES permit simply to direct the natural runoff of rainwater from their lands squarely conflicts with the language and structure of the statute, its legislative history, and the contemporaneous understanding of those involved in crafting the 1987 amendments. It should be reversed.

2. To be sure, when Congress added the agricultural stormwater discharge exemption to the Clean

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[4] During a three-day conference hosted by EPA on the topic of nonpoint source pollution, numerous environmental groups submitted reports. *See* EPA, Office of Water Regulations and Standards, Publ'n No. 440R85013, *Perspectives on Nonpoint Source Pollution* (1985), *available at* http://www.epa.gov/nscep/index.html (enter title in search field). These groups also recognized that both agricultural *and* silvicultural activities constituted nonpoint sources of pollution. *See id.* at 55 (Environmental Defense Fund) (describing the "siting" of "agricultural" and "forestry" activity as "central to its potential nonpoint source pollution impact on receiving surface or groundwater quality"); *id.* at 60 (National Audubon Society) (explaining that "nonpoint source polluters" such as "the farmer, the forest products company, the miner, and the rancher should all benefit from the retention of soil on their land").

Water Act in 1987, it did not expressly mention silvicultural stormwater. But there is a good reason for that: In 1987, EPA's longstanding rule already exempted silvicultural stormwater runoff from the NPDES. *See* 40 C.F.R. § 122.27. The rule specified only four discrete activities that should be deemed to be point sources even though they are related to forestry: rock crushing, gravel washing, log sorting, or storage. *See id.* § 122.27(b). The nature of these activities explains why: they all involve stand-alone industrial facilities and operations. Indeed, these facilities are no more "silviculture" than a meat-processing plant would be "agriculture." In both cases, there is an obvious distinction between the farming or forestry activity itself—harvesting timber, growing crops, or raising livestock—and the downstream processing of the product resulting from that activity. All true silvicultural activities—site preparation, planting, harvesting, and transporting, to name a few—from which stormwater runoff occurs are nonpoint sources under EPA's rule. That view faithfully follows the text, structure, and history of the Clean Water Act.

In contrast to the approach it took with silviculture, EPA had determined that some types of agricultural-pollution discharges should be subject to the NPDES regime. *See* Application of Permit Program to Agricultural Activities, 41 Fed. Reg. 28,493 (July 12, 1976). Congress disagreed with that approach; it therefore adopted the categorical agricultural stormwater exemption in the 1987 amendments to overturn the Agency's policy. Congress's express exclusions with regard to agriculture thus have been reactive in nature, correcting interpretations of the Act that were contrary to the legislature's intent.

For instance, in 1977, Congress excluded from the definition of point source "return flows from irrigated agriculture," Pub. Law. No. 95-217, § 33(b), 91 Stat. 1566, 1577 (Dec. 27, 1977), because "[p]ermit requirements under section 402 of the act have been construed to apply to discharges of return flows from irrigated agriculture." S. Rep. No. 95-370, at 35 (July 28, 1977), 1977 U.S.C.C.A.N. 4326, 4360.

But no such legislative corrective measure was required for silvicultural activities because EPA's silviculture rule had been on the books for more than a decade by that point. Originally promulgated in 1973, and revised in 1976 and again in 1980, the rule provides that silvicultural point sources are subject to the NPDES, but the term silvicultural point source "does not include non-point source silvicultural activities such as * * * harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b)(1). This rule reflects EPA's long-held view that management of stormwater runoff from silvicultural activities—channeled or not—is best left to the states. *See* Brief for Pets. 6-9; Pet. App. 100a-102a.

For example, in the preamble to the proposed 1976 rule, EPA explained that it had "determined that most water pollution related to silvicultural activities is nonpoint in nature. This pollution is basically runoff induced by precipitation events and is not and should not be subject to the [NPDES] permit program as it has been administered to date." Silvicultural Activities, 41 Fed. Reg. 6,281, 6,282 (proposed Feb. 12, 1976). EPA based this determination on "[t]he [Clean Water Act] and its legislative history," which "make clear that it was the intent of Congress

that most water pollution from silvicultural activities be considered nonpoint in nature." *Id.* EPA also clarified that channeled runoff from logging roads was not subject to the NPDES: The Agency included drainage from "road construction and maintenance" in its list of silvicultural *nonpoint* sources, explaining, "[i]nsofar as such drainage serves only to channel diffuse runoff from precipitation events, it should be considered nonpoint in nature and has been added to the list." Application of Permit Program to Silvicultural Activities, 41 Fed. Reg. 24,709, 24,711 (June 18, 1976). That definition of silvicultural nonpoint sources remains in the regulation to this day (although it has been tested by the decision below). *See* 40 C.F.R. § 122.27(b)(1).

Accordingly, for almost 40 years, EPA has (correctly) viewed channeled stormwater runoff from logging roads as a nonpoint source of pollution. Congress therefore has never had a reason to intervene. The Ninth Circuit overstepped its role by substituting its judgment for that of Congress and EPA.

3. Common sense confirms EPA's view and demonstrates the inherent flaws in the lower court's reasoning. Previously, the Ninth Circuit understood that Congress considered "sediment run-off from timber harvesting, for example, [to] derive[ ] from a nonpoint source." *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). Indeed, the Clean Water Act expressly acknowledges that two principal examples of "nonpoint sources of pollutants" are "agricultural and silvicultural activities, including runoff from fields and crop and forest lands." 33 U.S.C. § 1314(f)(1), (2)(A). The very nature of these activities makes regulation-by-permit an ill fit. To begin with, mandating pollution controls through permits

issued to every single farmer, rancher, or forest landowner—all of whom must channel rainwater from their land—would be virtually impossible. But more fundamentally, that scheme would be well beyond the expertise of traditional pollution-control agencies. The solutions must come—as they always have—from local and State officials with expertise in appropriate and practicable farming and forestry practices that work for unique topographies and regions.

a. The sheer size of agriculture and silviculture in this country confirms why runoff from these activities has never—until the decision below concerning silviculture—been deemed appropriate for federally mandated permitting. As of 2011, there were 2.2 million farms in the United States covering 917 million acres. U.S. Dep't of Agric., National Agr. Statistics Serv., *Farms, Land in Farms, and Livestock Operations: 2011 Summary* 4 (Feb. 2012) (USDA Summary).[5] The most recent report from the USDA's Economic Research Service shows that, as of 2007, "forest-use land [was] at 671 million acres (30 percent); grassland pasture and range at 614 million acres (27 percent); [and] cropland at 408 million acres (18 percent) * * * ." Cynthia Nickerson *et al.*, U.S. Dep't of Agric., Economic Research Serv., *Major Uses of Land in the United States, 2007* at 1 (Dec. 2011).[6] By contrast, only 61 million acres, or 3 percent of the total U.S. land, is urban-use. *Id.* And

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[5] *Available at* http://usda01.library.cornell.edu/usda/current/FarmLandIn/FarmLandIn-02-17-2012.pdf.

[6] *Available at* http://www.ers.usda.gov/media/177328/eib89_reportsummary.pdf.

only a fraction of the 313 million acres devoted to "special uses" is industrial in nature. *Id.* at 1, 2. Thus, while requiring point-source-by-point-source permitting is no easy task for municipal and industrial stormwater discharges, it is downright impossible for agricultural and silvicultural stormwater runoff. There are simply too many rivulets, gullies, ditches, swales, and other conveyances from which stormwater "[is] or may be discharged," 33 U.S.C. § 1362(14), from the 1.7 *billion* acres of land devoted to agricultural and silvicultural activities to allow for a point-source permitting scheme.

b. The natural phenomena that generate countless channelized stormwater outlets to streams from farms and forestlands underscore why the Ninth Circuit's rule is so troubling and unworkable. According to the court below, silvicultural stormwater should be deemed nonpoint source only when the stormwater is "allowed to run off naturally." Pet. App. 11a. The Ninth Circuit panel assumed that, absent human intervention, rural stormwater runoff would "dissipate[ ] in a natural and unimpeded manner"—i.e., as sheet flow. Pet. App. 10a. But as any farmer, rancher, or forest landowner knows, surface runoff does not work that way.

"Surface runoff occurs when water originating in precipitation (rainfall and snow) flows freely on the surface of the earth, driven by gravitational forces." American Soc'y of Civil Eng'rs, *Hydrology Handbook* 331 (2d ed. 1996). When the rain initially falls on virgin grounds its "first manifestation" is "overland sheet flow." *Id.* at 331-332. But "[g]iven the topographical irregularity of the earth's surface, overland flow soon concentrates into rill flow." *Id.* at 332. Natural erosion carries away topsoil layers, causing

narrow and shallow channels in the earth—the "rill flow." *Id.* Rill flow then "concentrates into gully and stream flow." *Id.* In sum, "[r]unoff and stream flow are continuous processes by which water is constantly flowing from higher to lower elevations by the action of gravitational forces." *Id.* at 331. All of this is to say that stormwater on rural land will *not* "dissipate[ ] in a natural and unimpeded manner" as suggested by the Ninth Circuit, but instead will, through entirely natural processes, be "collected or channeled and then discharged." *See* Pet. App. 10a. Channelized stormwater discharges are as "natural" as the laws of physics.

4. On farms and in forests, constructing culverts is one of the principal land-use tools that States have designed for controlling stormwater. When properly constructed and managed, ditches and culverts running through farms and forests, and along rural and logging roads, seek to replicate the naturally forming rill and gully flow. But there is one key difference: Unlike the random pattern of gullies and rivulets that nature carves into the land, the culverts and ditches mandated by State plans are carefully arranged to prevent erosion and minimize sediment runoff into streams and rivers.

Yet under the Ninth Circuit's view, the intervention of man's hand in creating stormwater conveyances that Mother Nature would have haphazardly created herself demands a permit for this otherwise nonpoint source runoff. That novel rule cannot be harmonized with the statutory language, conflicts with EPA's longstanding practice, and is wholly impractical to boot. Indeed, it is precisely the interpretation that one of the sponsors of the floor amendment that led to the 1987 Stormwater

Amendments, Senator Malcolm Wallop, dubbed "absurd." 131 Cong. Rec. 15616, 15657 (June 13, 1985) (statement of S. Wallop).[7]

* * *

The Clean Water Act strikes a careful balance. It summons the full regulatory authority of the federal government when dealing with urban and industrial stormwater, but it assigns responsibility over rural stormwater—and particularly agricultural and silvicultural stormwater—to the entities that have always exercised it: the States and local governments. That is because Congress recognized that only comprehensive land-use control—designed by local officials exercising their expert knowledge to address site-specific problems—will do.

The Ninth Circuit overlooked this basic division and the reasons Congress forged it. By its lights, only a federal permitting scheme would accomplish the principal objectives of the Clean Water Act. But that is too facile. By overlooking the deliberate balance Congress struck, the Ninth Circuit erred. Its judgment should be reversed.

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[7] The Senator called it "absurd" to "require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source." 131 Cong. Rec. at 15657. EPA's then-existing stormwater regulation (following judicial mandates) interpreted the term "point source" to include all such "devices." But, Senator Wallop explained, "[t]his is overbroad in its reach," "would be an administrative nightmare," and "would also be prohibitively expensive to administer." *Id.*

B. One Of The Primary Targets Of The Non-Point Source Management Program Was Pollution From Agricultural And Silvicultural Activities.

1. By adopting the Section 319 Nonpoint Source Management Program through the 1987 amendments, Congress supplemented and substantially expanded the area-wide waste treatment management program of Section 208. Under Section 319, States are directed to prepare "management programs" that identify BMPs for various categories of nonpoint sources. 33 U.S.C. § 1329(b). Each management program must identify "best management practices which will be undertaken to reduce pollutant loading" and explain how the program will "achieve implementation" of those practices. *Id.* § 1329(b)(2)(A), (B).

One of the principal targets of the Nonpoint Source Management Program was rural sources of pollution: agriculture and silviculture. The author of the Nonpoint Source Management Program amendment, Representative James Oberstar, in fact, singled out agricultural and silvicultural nonpoint sources, described the states' efforts to control these sources of pollution, and remarked that "[t]here is considerable interest [on the part of the states] in doing more, if funds and other encouragement from the Federal Government are forthcoming." 4 *Legislative History* at 2819 (statement of Rep. Oberstar). Representative Oberstar also clarified that these activities should be left to state regulation. He explained that his bill "recognizes first that, unlike point sources of pollution, nonpoint sources do not lend themselves to a national control program with national standards." *Id.* "Rather," he continued, "controls must be devel-

oped at the State and local levels, to address local conditions." *Id.* That is just what the Nonpoint Source Management Program did. Congress crafted a federal point-source scheme for urban and industrial sources of pollution, while reserving to the states the authority to formulate site-specific BMPs for rural sources of pollution.[8]

This makes good sense. After all, "the control of non-point source pollution was often thought impractical and not properly subject to federal direction. What was the EPA supposed to do, tell farmers how to farm?" William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 Ala. L. Rev. 537, 562 (2004) (footnote omitted). Even the Ninth Circuit previously recognized as much: "The reason for the [Clean Water Act's] focus on point sources rather than nonpoint sources is simply that '[d]ifferences in climate and geography make nationwide uniformity in controlling non-point source pollution virtually impossible.'" *Oregon Natural Desert Ass'n* v. *U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (quoting Marc R. Poirier, *Non-point Source Pollution*, *in* Environmental Law Practice Guide § 18.13 (2008)).

The decision below, however, unduly hamstrings the States in developing best management practices for much rural stormwater runoff. Under the Ninth Circuit's view, if a state determines that the best

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[8] Courts have recognized the same, observing that the Clean Water Act's federal regulatory scheme "generally targets industrial and municipal sources of pollutants, as is evident from a perusal of its many sections." *United States* v. *Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993).

way to manage stormwater runoff along forest roads is through channeling (in order to, for example, prevent erosion), that "best management practice" transforms a nonpoint source into a point source and requires a permit. Thus, the Ninth Circuit effectively reads into the statute a prohibition on the use of any channeling or conveyance techniques as BMPs to manage and limit stormwater pollutant runoff.[9] But nothing in the statute, its structure, or its legislative history demonstrates Congress's intent to tie the hands of the states in this manner. To the contrary, as EPA stated 36 years ago, "[i]t is evident * * * that ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject to the § 402 permit program." 41 Fed. Reg. at 6,282. The Ninth Circuit's failure to appreciate this distinction was legal error.

2. Adding the Nonpoint Source Management Program (and the Stormwater Amendments) to the Clean Water Act culminated a long process to appropriately define the respective roles of EPA and the States with respect to stormwater runoff. When it enacted the Clean Water Act, Congress was careful

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[9] The Clean Water Act *prohibits* any regulated point source discharge absent a permit. *See* 33 U.S.C. § 1311(a). Even where landowners seek a permit, permits for stormwater conveyances may often be unavailable in areas with already impaired water quality. Permits for channeled stormwater discharges might be unavailable because those discharges might "contribute" to further water-quality impairment within the meaning of EPA's permitting regulations, 40 C.F.R. § 122.44(d), and yet the same discharges in the form of uncontrolled "natural" runoff could potentially carry larger loads of sediment and remain unregulated.

to "to recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution." Pub. L. No. 80-845, § 1, 62 Stat. 1155, 1155 (June 30, 1948). To this day, the Act maintains that same policy. 33 U.S.C. § 1251(b). And from 1972 to 1987, Congress's actions reflect its determination to place greater responsibility on the States—not to transfer responsibility to EPA—for addressing rural stormwater runoff.

First, the 1972 Clean Water Act established a state area-wide waste treatment management program (Section 208), through which states were encouraged to "identify, if appropriate, agriculturally and silviculturally related nonpoint sources pollution, * * * and * * * set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." Pub. L. No. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (Oct. 18, 1972). Even then, Congress recognized that the States, not the federal government, should take the lead in addressing most stormwater runoff through land-use regulation. As one of the Act's sponsors emphasized, "[t]here is no effective way as yet, other than land use control, by which you can intercept * * * runoff and control it in the way you do a point source." 117 Cong. Rec. 38825 (Nov. 2, 1971) (statement of Sen. Muskie). But this program was largely ineffective due to lack of funding.

So, in 1977, Congress amended the Act to provide financial incentives to rural landowners to encourage them to comply with state programs. *See* Pub. L. No. 95-217, § 35, 91 Stat. at 1579-81. It created a mechanism whereby the Secretary of Agriculture could enter contracts with these landowners to share in the costs of implementing state BMPs. *See* 33

U.S.C. § 1288(j) ("agricultural cost sharing"). Legislators viewed this as a step toward increasing the responsibilities of the States in regulating water pollution: "The Congress expects the States to assume more and more of the responsibilities of the water pollution program. It has therefore fashioned a program which increases Federal resources available as responsibilities increase." 123 Cong. Rec. 39170, 39178 (Dec. 15, 1977) (remarks of S. Muskie). Congress understood that nonpoint sources of pollution were best controlled at the local level: "Between requiring regulatory authority for nonpoint sources, or continuing the section 208 experiment, the committee chose the latter course, judging that these matters were appropriately left to the level of government closest to the sources of the problem." S. Rep. No. 95-370, at 9, 1977 U.S.C.C.A.N. at 4335.

In 1987, Congress went further still. At the same time it created the stormwater discharge control provisions at issue in this case, Congress added the Nonpoint Source Management Program, discussed above. That regime reaffirms that nonpoint sources—including agricultural and silvicultural stormwater runoff recognized as nonpoint sources under longstanding EPA regulation and the 1987 statutory exclusion for agricultural stormwater—remain a matter of land-use control for which the States, not the federal government, assume primary responsibility. *See* 33 U.S.C. § 1329.

In focusing almost exclusively on the 1972 "point source" definition, the Ninth Circuit all but ignored this critical 1987 milestone, as well as the overall design of Congress reflected in the larger statutory context. The result was a novel rule that betrays more than three decades of congressional initiatives

to address water pollution through distinct programs designed not only to preserve, but to enhance, States' authority over agricultural and silvicultural storm-water runoff.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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SEPTEMBER 2012

Nos. 11-338, 11-347

In The
Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN FOREST RESOURCE COUNCIL, PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, MONTANA WOOD PRODUCTS ASSOCIATION INC., ARKANSAS FORESTRY ASSOCIATION, FEDERAL FOREST RESOURCE COALITION INC., MINNESOTA FOREST INDUSTRIES, INC., AND INTERMOUNTAIN FOREST ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae represent companies and families that depend, in part, on federal forests and rangeland for their livelihood. *Amici* are concerned about access across federal forest roads to transport logs and cattle, to maintain vested water rights, for ingress to and egress from their private property, to promptly control insect and disease outbreaks, and to battle wildfire.

American Forest Resource Council (AFRC) is an Oregon nonprofit corporation that represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC represents over 50 forest products businesses and forest landowners. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions regarding access to, and management of, forest lands.

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[1] All the petitioners and respondent have filed a letter of blanket consent to filing *amicus* briefs and letters are lodged with the Clerk. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

In states where AFRC members are located, they purchase the majority of timber from federal lands managed by the U.S. Department of Agriculture, Forest Service and U.S. Department of Interior, Bureau of Land Management (BLM). AFRC members also enter into long-term stewardship contracts on the federal lands that include forest restoration projects such as repairing roads and replacing culverts. AFRC members also own land adjoining federal land that can only be accessed by crossing roads on federal land subject to permits, easements, and right-of-way agreements.

The Public Lands Council (PLC), headquartered in Washington, D.C., represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC is a Colorado nonprofit corporation. PLC membership consists of state and national cattle, sheep, and grasslands associations. PLC works to maintain a stable business environment for public land ranchers in the West where roughly half the land is federally owned and many operations have, for generations, depended on public lands for forage.

PLC members hold long-standing permits to graze on federal allotments. Many of them also own water rights, the claim to which depends upon those ranchers' continued beneficial use of the water, primarily through livestock grazing. PLC members develop and maintain water sources and other improvements on their allotments and use roads across federal land to manage vested water rights. Such access roads to

grazing allotments often are the same roads used to remove logs from federal land. PLC ranching families also own millions of acres of range and forest land, some of which is intermingled with federal land and, like AFRC members' properties, can only be reached by roads crossing federal land. The use of roads on federal land is critical to PLC's ability to continue properly managing natural resources and producing food and fiber for the nation and world. The loss of the exempt status of these roads would burden ranchers with new permitting costs, and incite litigation against the land management agencies, taking time and resources away from the already-belabored grazing permitting process. Thus, not only will PLC members' access be threatened; the renewal of their permits could be in jeopardy, as well.

The National Cattlemen's Beef Association (NCBA) is the national trade association representing the entire cattle industry. NCBA is a Colorado nonprofit corporation. NCBA represents nearly 139,000 cattle producers and 45 affiliated state associations throughout the United States. NCBA works to advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests. NCBA members are proud of their tradition as stewards and conservators of America's land and waters, and good neighbors to their communities. Many of NCBA's western members own water rights, hold federal grazing permits or own range and forest land intermingled with federal land. NCBA members

use the same public roads to move cattle between their private property and federal allotments that are used to remove logs. Without reliable and prompt access, NCBA members' ability to retain their water rights, protect the resource and stay in business is jeopardized. Adding another layer of permitting and increasing the opportunity for environmental litigation will also cause hardship for federal lands ranchers.

The Montana Wood Products Association, Inc. (MWPA) is a Montana nonprofit corporation promoting healthy forests and healthy communities through management of Montana's forests. MWPA's membership includes companies and individuals involved in all facets of Montana's wood products industry. They produce value-added products through manufacturing and provide over 7,500 direct jobs for Montana families. Since about 60 percent of Montana's forest land base is owned by the federal government, much of which is intermingled with MWPA members' private timberland, road access to and through these lands is vital to maintaining healthy forests, producing timber, and protecting lands from wildfire.

The Arkansas Forestry Association (AFA) is an advocate for the sustainable use and sound stewardship of Arkansas's forest resources to benefit AFA members and all Arkansans, today and in the future. AFA is an Arkansas nonprofit corporation. AFA members manage private forestland to produce essential forest products, while maintaining fresh water and air supplies, and enhancing fish and wildlife habitat.

AFA represents one of the state's largest manufacturing sectors which directly employs about 33,000 people with a $1.46 billion annually in payroll. National forests are an important timber source for AFA members in western Arkansas and AFA supports continued access to these forests. AFA has a long-standing interest in ensuring that the use of forest roads on federal land is subject to best management practices and not NPDES permits. AFA was an intervenor in a case on the Ozark National Forest where the Eighth Circuit ruled that logging and road building was covered by EPA's silvicultural exemption from NPDES permits. *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998).

The Federal Forest Resource Coalition, Inc. (FFRC) is a national coalition consisting of small and large companies and regional trade associations throughout the country whose members manufacture wood products, paper, and renewable energy from federal timber resources. FFRC is a District of Columbia nonprofit corporation. Coalition members employ over 350,000 workers in over 650 mills, with payroll in excess of $19 billion. FFRC wants to ensure timely and effective access to federal lands to sustainably produce timber, pulpwood, and biomass and for prompt management to protect federal forests from insects, disease, and wildfire.

Minnesota Forest Industries, Inc. (MFI) represents forest products producers and landowners that are committed to conservation, quality forest management, and industry development that fosters sound

environmental stewardship, multiple use of timberlands, and a dependable long-term timber supply. MFI is a Minnesota nonprofit corporation. Many of MFI's members purchase sawtimber and pulpwood from the Superior and Chippewa National Forests. MFI's members depend on timely access to these forests to complete timber sale contracts, particularly since access is limited during certain seasons. Disruption of access because of a time consuming NPDES permit process would diminish an important supply of federal timber to MFI's members.

Intermountain Forest Association (IFA), a Wyoming nonprofit corporation, develops and implements solution-oriented policies intended to provide a positive climate for forest management as well as a stable and sustainable supply of timber from public forestlands. IFA also works to assure that regulations affecting its members remain reasonable. IFA has members in Wyoming, Colorado, Montana, and South Dakota. IFA has a firm commitment to environmental responsibility and accountability, advancements in manufacturing technology and forestry science, and the business principles that have helped forest products businesses survive and prosper in the Intermountain West for a century. IFA members rely on national forest timber sales for an important part of their timber supply and have an interest in continued and ready access to the national forests.

PLC and NCBA (grazing *amici*) are deeply concerned with the prospect of having access to their members' grazing allotments prohibited or restricted

because of a requirement for NPDES permits. Grazing *amici* are also concerned about access delays and restrictions impeding the development and maintenance of water improvements many of which support vested water rights. AFRC, MWPA, AFA, FFRC, MFI, and IFA (timber *amici*) interests in obtaining timber from federal lands to run their mills would be harmed by an expensive and lengthy permit process imposed on federal agencies to obtain NPDES permits. All *amici* have an interest in continued access to their members' private land using roads that cross intermingled federal land and the prospect of new avenues for environmental litigation against federal agencies further threatens *amici's* members' livelihoods.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals failed to give deference to the Environmental Protection Agency's (EPA) long-standing interpretation that forest road construction, use, and maintenance from which natural runoff occurs does not require an NPDES permit under section 402 of the Clean Water Act, 33 U.S.C. § 1342.

Rather than repeat petitioner's legal arguments, *amici* want to emphasize the exceptional importance of the Ninth Circuit's decision to the management of the vast acreage of federal forest and rangeland which supply timber and forage for thousands of families and businesses in rural communities. *Leo Sheep*

Co. v. United States, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari"); *Andrus v. Utah*, 446 U.S. 500, 506 (1980). The effect of the Ninth Circuit decision extends beyond non-federal lands and logging activity which are at issue in this case. The decision also applies to millions of acres of federal land and to the roads used to access timber sales on national forests and public lands managed by the BLM. The decision also affects ranchers who use roads on federal land to access their federal grazing allotments and to maintain water rights, and to intermingled private and state landowners whose lands can only be accessed by roads across federal land.[2] Finally, neither the Ninth Circuit nor EPA has defined what in fact constitutes a "logging road" or a "forest road." Many roads on public lands are used for forest management activities beyond logging, including critical access for fighting wildfires, for recreation, and for other multiple use activities. Access for these purposes would all be impacted by an NPDES permit requirement.

Amici agree with EPA's long-standing interpretation that logging which occurs over several months on a site on 20 to 40 year intervals is not an industrial activity and that natural runoff is best controlled by non-point source best management practices. 55 Fed.

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[2] States owning land intermingled with federal land will be similarly affected.

Reg. 47,990, 48,011 (Nov. 16, 1990). Logging on tracts of public land is even less frequent, often separated by intervals of 50 years or more. Nor is grazing an industrial activity when it occurs on a federal allotment where a pasture may be grazed for only a few weeks out of the year and the road used twice annually to bring livestock to and from federal pastures. Moreover, on millions of acres of federal land, the same road accesses both federal forest and pasture and an injunction or regulatory restrictions on hauling logs will harm ranchers who need to use the same roads to haul livestock.

ARGUMENT

The Ninth Circuit decision will broadly limit the federal land management agencies' ability to continue to sell timber, issue grazing permits, manage and authorize fencing and water source improvements, contract for road construction and restoration projects, and provide timely access to intermingled private lands that can only be reached across federal land.

A. Resource Management of a Vast Area of Federal Forest and Rangeland is Likely to be Disrupted by the Erroneous Ninth Circuit Decision.

It is unclear whether the federal land management agency and the intermingled private landowners or

timber purchasers, grazing permittees, and road contractors would be obligated to obtain NPDES permits and conduct the required water runoff monitoring or whether this would be the responsibility of the federal land management agency. Regardless of who is responsible for obtaining the permit and conducting the monitoring, it would be an extremely costly, time-consuming, and daunting task. Nationwide, the Forest Service has approximately 378,000 miles of roads under its jurisdiction, covering 193 million acres. U.S. FOREST SERVICE, IMPLICATIONS OF DECISION IN *NEDC V. BROWN* TO SILVICULTURAL ACTIVITIES ON NATIONAL FOREST SYSTEM LAND, Doc. 1570-1, at 3 (Sept. 7, 2010). *Amici* App. 1a. The Forest Service estimates that if it must obtain permits for roads under its control, it would have to obtain over 400,000 permits. The agency estimates it could take more than 10 years to complete the permitting process. *Id.* at 5a. Even if the Forest Service can obtain programmatic permits by state, it estimates it would still take several years to obtain the necessary programmatic permits. *Id.*

The NPDES permit requirements and associated litigation will significantly impede the ability of the Forest Service and BLM to manage federal forests and rangeland, sell timber, issue grazing permits, repair roads, and restore forests and range to reduce the risk of wildfires. Wildfires on unhealthy federal forests and rangeland have burned onto *amici's* members' private lands damaging forest and range resources including wildlife habitat and water quality. An onerous permitting process to keep roads open

and maintained will increase the incentive for federal agencies to expand the obliteration and closure of roads and will discourage road maintenance. This will exacerbate the problem of federal, local, and private firefighters being hindered by inadequate access in an initial attack of wildfires during the critical first 24 hours after a fire starts and mean fewer roads to use as a fuel break to control a fire. Thousands of acres have burned unnecessarily because of limited access.

Both the Forest Service and BLM have a large backlog of fish passage restoration work to replace road culverts that are blocked, poorly sized, or too far elevated above the stream. U.S. General Accounting Office, GAO-02-136, RESTORING FISH PASSAGE THROUGH CULVERTS ON FOREST SERVICE AND BLM LANDS IN OREGON AND WASHINGTON COULD TAKE DECADES (2001). An NPDES permit requirement for installation of replacement culverts will stall this fish habitat improvement work even further. Formal administrative protests have been filed to halt use of roads for projects involving log hauling and road rehabilitation work on BLM lands on the grounds that the projects need a Clean Water Act discharge permit. *See Administrative Protest of Evans Creek Project Decision Record and Finding of No Significant Impact as Implemented via the Skeleton Mountain Timber Sale*, Klamath Siskiyou Wildlands Center, http://www.blm.gov/or/districts/medford/plans/evans/files/KSWildSkeletonProtest.pdf at 20.

Amici's concern that a vast acreage of federal lands will be drawn into this controversy is supported by actions of environmental groups. Before Congress temporarily directed that the Administrator of the EPA not require NPDES permits for discharge of stormwater runoff from forest roads (section 429 of the Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 429, 125 Stat. 786, 1046-47 (Dec. 23, 2011)), environmental groups threatened to stop the use of roads on federal land based on the Ninth Circuit decision. Three days after the Ninth Circuit filed its original opinion, the Alliance for the Wild Rockies and the Selkirk Conservation Alliance filed a 60-day notice of intent to sue for violation of the Clean Water Act challenging the Lakeview-Reeder Fuels Reduction Project. App. 10a. The project involves road maintenance, road construction, and road storage and decommissioning to achieve long-term sediment reduction and watershed improvement on the Idaho Panhandle National Forest in Idaho. A complaint challenging the project was filed on October 6, 2010. *Alliance for the Wild Rockies v. McNair*, No. 2-CV-00504-EJL (D. Idaho). The Forest Service subsequently withdrew the project and it was over a year and a half before supplemental analysis was complete.

Two projects in California were also challenged on the grounds that the Forest Service has not obtained an NPDES permit for the silviculture, road use, and road restoration included in these projects. The first project is the Angora project in the Lake

Tahoe Basin Management Unit that was prepared in response to the Angora fire within the Wildland Urban Interface (WUI) Defense Zone, which destroyed or damaged more than 250 structures on the South Shore of Lake Tahoe. *Environmental Assessment, Angora Fire Restoration Project,* USDA FOREST SERVICE (July 2010), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5181776.pdf. The Angora project includes removal of dead and dying trees, relocating roads outside of streamside zones, replacement of undersized culverts, and construction, decommissioning, and restoration of roads. *Id.* The second project is the Klamath National Forest travel management plan that will prohibit off-highway vehicle travel in some areas and permit off-highway vehicle travel on other roads. *Final Environmental Impact Statement; Motorized Travel Management Plan (formerly Motorized Route Designation), Klamath National Forest California and Oregon,* USDA FOREST SERVICE (January 2010), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5120060.pdf. Off-highway vehicles and federal roads are used by ranchers to administer their federal grazing allotments, move livestock between pastures, and maintain fences and water sources. The administrative appeal argued that the Forest Service must obtain an NPDES permit which will delay much needed road restoration, culvert replacement, and forest health projects that lead to improved water quality.

The EPA has announced its intent to revise stormwater regulations to specify that NPDES permits are

not required for stormwater discharges from logging roads under Phase I of the stormwater program. 77 Fed. Reg. 30,473 (May 23, 2012). EPA also announced in the notice that it will consider adoption of remedial regulations with forest roads under the Clean Water Act section 402(p)(6), *id.*, presumably because forest roads will remain point sources unless this Court reverses the Ninth Circuit's decision invalidating EPA's regulation at 40 C.F.R. § 122.27. However, plaintiffs are certain to litigate EPA's interpretation relying on the Ninth Circuit's holding that section 402(p) of the Clean Water Act unequivocally creates a statutory obligation to treat stormwater runoff from logging roads as a discharge associated with industrial activity. Pet. App. 43a. Thus, EPA's approach does not eliminate the regulatory burden or the high likelihood of litigation gridlock.

B. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Struggling Forest Products Businesses that Rely on Federal Lands as a Source of Timber.

The extension of the Ninth Circuit's decision to federal forest land will adversely affect *amici's* members – whether responsibility to obtain the NPDES permits lies with the federal agencies or *amici's* members who have contracts, permits, leases, easements, and right-of-way agreements with these agencies. In either case, the sale and removal of timber from federal land and the use of grazing allotments will be

more costly and the approval process will be significantly delayed. Maintaining a steady supply of public timber at current market prices is crucial to help existing milling infrastructure survive which is also needed to help fight the forest health crisis on federal lands. Kramer, *Forest Service Says Lack of Sawmills Hurting Forests,* Wenatchee World (April 12, 2011), http://www.wenatcheeworld.com/news/2011/apr/02/forest-service-says-lack-of-sawmills-is-hurting/. Delaying public timber sales now for several years by requiring a costly NPDES permit process for the use of logging roads will threaten the already tenuous operations of sawmills, and of road and stewardship contractors that provide scarce jobs to support the struggling economies of rural communities. In order for the installed milling capacity and the skilled woods workers who support it to survive to better times, it is vital that the timber supply from public lands not be further curtailed by an NPDES permit process. If this infrastructure is lost by further constraining the supply of timber, it is unlikely that the investment will ever again be made in this industry and the loss of jobs will become permanent. This will devastate already struggling rural communities.

C. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Ranching Families and Businesses that Often Use the Same Roads Used for Logging on Federal Land.

Ranching families and businesses face similar concerns regarding the Ninth Circuit decision as they depend on "logging" roads to access their grazing leases on federal land. Since federal regulations discourage construction of duplicate roads, separate road systems have not been created for each specific purpose. *See, e.g.,* 43 C.F.R. § 2812.0-6(a)-(b) ("The intermingled character of the O. and C. lands presents peculiar problems of management which require for their solution the cooperation between the federal government and the owners of intermingled lands, particularly with respect to timber roads . . . the duplication of an existing road reduces the value of the federal and other timber which is tapped by the existing road."). Federal roads are used by loggers and ranchers alike. If the use and maintenance of a "logging" road on federal land without an NPDES permit violates the Clean Water Act, then invariably the Forest Service or BLM will preclude the use of the road for hauling logs, livestock, or other commercial products until an NPDES permit is issued. If the agencies choose not to preclude use of a "logging" road pending completion of an NPDES permit, then environmental groups undoubtedly will seek a judicial order to preclude the use of the road more broadly. *Amici* App. 9a.

D. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Intermingled Landowners who Require Access Across Federal Land.

Federal land is often intermingled with private land and the use of private land is dependent upon access across federal land. *See, e.g.,* E. RICHARDSON, BLM'S BILLION – DOLLAR CHECKERBOARD, MANAGING THE O & C LANDS (1980); Forest Roads: Construction and Financing, Cong. Res. Serv. Rep. 97-706 (1997), p.1 n.1. The Forest Service and BLM often have road use or right-of-way agreements with intermingled landowners that provide for sharing the cost of road construction and maintenance. *See* 42 U.S.C. § 1762 (Cost-Share Road Authorization). The BLM updated their Best Management Practices in 2011 and "as a result, current road construction and maintenance standards are substantially improved over the standards in existence when the CWA was enacted in 1972." 77 Fed. Reg. 30,473, 30,478 (May 23, 2012). *Amici* who have in holdings must access their forest or rangeland across roads on federal land. Lawsuits to compel federal agencies to obtain permits for federal roads will directly affect intermingled landowner access. Intermingled landowners face the prospect of being denied access to their private lands while waiting for federal land management agencies to complete the NPDES permit process.

CONCLUSION

Amici respectfully request that the Court reverse the Ninth Circuit's holding that NPDES permits are required for logging roads which extend through millions of acres of federal forest and rangelands and intermingled private lands. These lands supply timber and forage to support rural families and businesses that cannot afford to have federal resource management paralyzed by an unnecessary permit process and an interpretation of the Clean Water Act that will provide environmental groups new fertile ground for public lands litigation.

Respectfully submitted,

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August 2012

APPENDIX

IMPLICATIONS OF DECISION IN *NEDC V. BROWN* TO SILVICULTURAL ACTIVITIES ON NATIONAL FOREST SYSTEM LAND, U.S. FOREST SERVICE, SEPT. 7, 2010

Forest Service
Washington Office
1400 Independence Avenue, SW
Washington, DC 20250

File Code: 1570-1 Date: September 17, 2010

Route To:

Subject: Implications of Decision in Northwest Environmental Defense Center v. Brown to Silvicultural Activities on National Forest System Land

To: Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs and WO Directors

On August 17, 2010, the United States Court of Appeals for the Ninth Circuit (9th Circuit), in *Northwest Environmental Defense Center v. Brown* (*NEDC*), 07-35266 (9th Circuit), ruled that it considers storm water runoff from logging roads to be a discharge of pollutants from a point source when collected by ditches, canals, and culverts and discharged into streams. As such, the 9th Circuit ruled that these discharges are subject to permitting requirements of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES). Environmental Protection Agency (EPA) regulations at Title

40, Code of Federal Regulations, Section 122.27 (the "Silvicultural Rule,") exempted such discharges from the CWA's permitting requirements prior to this ruling. The Court held that the Silvicultural Rule violates CWA.

Although the Forest Service was not a party to *NEDC*, several questions have arisen about application of the decision to silvicultural activities on National Forest System land and its impacts on State, private, Tribal, and forest lands under other jurisdictions. The enclosed document, prepared by the Forest Service and the Office of General Counsel, addresses questions that field units have asked about *NEDC*.

Because the Forest Service was not a party, the Agency is not immediately impacted by the 9th Circuit decision in this case. At this time it is recommended that Forest Service personnel:

- Continue the use of best management practices, compliance monitoring, and update of National Best Management Practices Handbook and Monitoring Protocols.
- Work with EPA regional offices and States with delegated permitting authority to address permitting for logging road ditches and culverts.
- Continue to coordinate closely with EPA regarding best management practices.

If you have further questions regarding *NEDC* and its impact on the Forest Service, please contact your regional Office of General Counsel.

/s/Richard J. Cook (for) Tony Tooke
TONY TOOKE
Director for Ecosystem Management Coordination

cc: Anne Zimmermann
Richard Sowa
Tom Peterson

Q&As: 9th Circuit's August 17, 2010 decision in *Northwest Environmental Defense Center v. Brown*

Date: September 7, 2010

Issue: The 9th Circuit ruled that it considers storm water runoff from logging roads collected by ditches and culverts and discharged into streams to be a discharge of pollutants from a point source subject to permitting requirements of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES). Environmental Protection Agency (EPA) regulations at Title 40, Code of Federal Regulations (CFR), Section 122.27 (the "Silvicultural Rule,") exempted such discharges from the CWA's permitting requirements. The court held this exemption violates CWA.

Q: Was the Federal Government a Party to this litigation?

A: No. Neither EPA nor the Forest Service (FS) was a party in this lawsuit. This case involved environmental groups, private timber operators, and Oregon

state officials. The FS is not *immediately* bound by this ruling. However, it could have impacts on FS activities.

Q: Did the 9th Circuit issue a nationwide injunction?

A: No. The 9th Circuit did not issue a nationwide injunction of the regulations at 40 CFR §122.27, but remanded the case to the District Court for further proceedings. The 9th Circuit has not issued any injunction, final order, or mandate. It is unclear when the District Court of Oregon will act or how those further proceedings may impact the FS or private entities.

Q: How might this lawsuit impact FS operations?

A: The FS will likely need to obtain a permit for the discharge of storm water from logging roads, which is channeled through a system of culverts, pipelines, ditches, or other diversions. Although the decision in this particular lawsuit did not immediately bind the Agency, the FS has received its first notice of legal challenge to road construction and maintenance activities based on this decision and anticipates additional challenges within the 9th Circuit. States located within the jurisdiction of the 9th Circuit Court of Appeals include Arizona, California, Nevada, Oregon, Idaho, Washington, Montana, Alaska, and Hawaii.

Q: If the FS needs to obtain NPDES permits for its logging roads, how long will that take?

A: The FS is still evaluating the answer to this question. EPA has delegated NPDES permitting authority affecting National Forest System lands to the State governments of all but four States (ID, NM, Mass., and NH) and has retained it in most of the territories (including Puerto Rico). Each State has a different process and timeline in place for issuing permits. Some States may determine that a general permit for logging roads is appropriate, while others may determine that individual roads or timber projects require road-specific or project-specific permits. The FS will have to work closely with EPA and the States to efficiently obtain permits where necessary.

If the FS is required to obtain programmatic permits by State, we may have to work with 46 States and the process could take several years. If the FS is required to obtain permits on a road by road basis, that would mean obtaining up to 400,000 permits. This would likely take more than 10 years. There would also be an ongoing workload to maintain and administer these permits.

States located within the jurisdiction of the 9th Circuit Court of Appeals should be prioritized for any permitting activity.

Q: If the FS must obtain NPDES permits for its logging roads, how much will it cost?

A: The FS is still evaluating the answer to this question. See answer above.

Q: How will this ruling impact private timberlands?

A: Timber companies and others conducting silvicultural operations on private timber lands will likely be impacted in a manner similar to the FS, in that under this ruling, they must obtain a NPDES permit for storm water runoff associated with silvicultural activities and logging roads discharged to waters of the United States through a system of culverts, ditches, and canals. There are approximately 260 million acres of private woodlands across the United States. They are accessed by a road network that consists of Federal, State, county, and private roads. Interior roads accessing these acres are low-volume timber access roads similar to roads found within the Federal estate which access comparable forested lands. Similar challenges will exist with NPDES permitting on these lands when ditch and culvert templates are used for drainage and travel way stability. The FS currently has inventoried approximately 378,000 miles of roads under its jurisdiction of approximately 193 million acres. Although no comprehensive database of roads traversing private timber roads exists, it is reasonable to extrapolate that private owners will have a proportionate number of roads needed to access their timber. The specific

issue before the 9th Circuit involved private entities and the State of Oregon, and the Court's ruling may eventually affect all entities involved in resource management, whether private, State, or Federal.

Q: Must the FS stop building logging roads to wait for permits from the States or EPA?

A: No. The ruling does not immediately apply to the FS. The Circuit Court remanded the case to the District Court of Oregon for further proceedings. The District Court's future opinions may be instructive as to when and how the ruling might take effect. The FS, in the interim, should coordinate closely with EPA to determine the most efficient way to move forward.

Q: Does the 9th Circuit's ruling apply to new, existing, or reconstruction of logging roads?

A: The opinion does not distinguish between new, existing, or reconstruction of logging roads, but concluded that storm water runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which a NPDES permit is required. The lawsuit challenged private timber operators' failure to obtain a NPDES permit for existing logging roads.

Q: Have EPA or the States permitted discharge of storm water from logging roads before?

A: No. Prior to the Court's August 17, 2010, opinion, the Silvicultural Rule at 40 CFR §122.27 was in effect

and no permit was required. The Silvicultural Rule was an exemption to the CWA's permitting requirements, and was based upon Best Management Practices that EPA and the FS had agreed upon, and which the FS already had in place.

Q: How will this Ruling change storm water management activities on the ground?

A: This ruling should not affect road management practices. The FS currently uses best management practices (BMPs) and will continue to implement them to minimize sediment delivery to streams.

Q: Is there any chance that this decision could be overturned after further review by a higher-level court?

A: This is unknown, but unlikely at this time. This decision was decided by the 9th Circuit Court of Appeals. Additional review by either the 9th Circuit or the Supreme Court is very rarely granted, and the Federal Government has almost no ability to request further review of this decision because it was not a party to the litigation.

SIXTY DAY NOTICE OF INTENT TO SUE, AUG. 20, 2010

Law Office of Dana Johnson, PLLC

Dana M. Johnson, Attorney at Law

August 20, 2010

VIA CERTIFIED MAIL

Chief Tom Tidwell
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RE: Sixty-day Notice of Intent to File Suit for Violations of the Clean Water Act

Dear Chief Tidwell, Supervisor McNair, Secretary Vilsack, and Secretary Salazar:

I am writing on behalf of Alliance for the Wild Rockies (AWR) and the Selkirk Conservation Alliance (SCA). AWR and SCA intend to file a citizen suit

pursuant to Section 505(a) of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. Section 1365(a). AWR and SCA hereby give notice, pursuant to Section 505(b) of the CWA, 33 U.S.C. Section 1365(b), that the USDA Forest Service has violated and continues to violate the conditions of the National Pollutant Discharge Elimination System (NPDES) as required by the CWA and its Implementing regulations.

On December 4, 2009, the Forest Supervisor of the Idaho Panhandle National Forests approved the implementation of the Lakeview-Reeder Roads Project, and on May 10, 2010, the Forest Supervisor of the Idaho Panhandle National Forests approved the implementation of the Lakeview-Reeder Fuels Reduction Project. AWR and SCA have reviewed public file documents available on the USDA Forest Service website for the Lakeview-Reeder HFRA Project and have identified reporting, monitoring, and compliance violations. If you have information that indicates the violations listed in this notice did not occur or are incorrectly stated, please immediately respond and specify to which violation that information applies. AWR and SCA intend to file suit at the end of the sixty (60) day notice period to enforce compliance against these violations as well as any additional violations that AWR and SCA may discover.

AWR and SCA are non-profit organizations dedicated to the protection of natural resources in the Northwest. AWR and SCA members regularly use and enjoy the waterways in Idaho, which are impaired by

the discharge of pollutants through stormwater runoff from logging roads. The Forest Service has an obligation under the CWA to regulate its stormwater discharges from these logging roads.

Violations of NPDES Permit Requirements for Point Source Discharge Stormwater Runoff from Logging Roads

Road work is proposed throughout the Lakeview-Reeder Project area, including road maintenance, road construction, and road storage and decommissioning. Major watersheds in the Project area are Granite Creek, Reeder Creek, and Kalispell Creek. Each of the streams in the project area is listed by the State of Idaho as impaired and not fully supporting beneficial uses. Kalispell Creek and Reeder Creek both have approved Total Maximum daily Loads (TMDL) for sediment. The Project would increase sediment delivery to these at-risk streams, thereby reducing water quality and impairing beneficial uses.

Stormwater runoff from logging roads deposits large amounts of sediment into streams and rivers. Much of this sediment is created by logging trucks hauling timber over roads and grinding up surface gravel and dirt. This sediment is then channeled away from road areas by ditches and culverts and eventually discharged into streams and rivers. The sediment adversely affects fish by disrupting eggs, decreasing oxygen levels, increasing stream temperature, and interfering with feeding.

This stormwater runoff, collection, and discharge is a point source discharge subject to the NPDES permit process under the CWA. Sections 301(a) and 402 of the CWA prohibit the discharge of any pollutant from a point source into navigable waters of the United States without a NPDES permit. The USDA Forest Service has violated the CWA and its implementing regulations by not obtaining permits for stormwater runoff that flows from logging roads into systems of culverts, ditches, and channels and then into forest streams and rivers.

Conclusion

If the above described violations are not cured, AWR and SCA intend to file suit under the CWA after the mandated sixty (60) day notice period to protect Idaho water resources and the interests of the AWR and CWA users who regularly use them, The intent of this action is to require the USDA Forest Service to come into full compliance with CWA requirements, particularly the NPDES permit process. In filing this action, AWR and CWA Intends to seek Injunctive relief as well as costs, attorneys' fees and litigation expenses as authorized by 33 U.S.C. Section 3.365(d).

If you wish to discuss any aspect of this notice or to discuss settlement of this matter prior to commencement of suit, please contact us.

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RECORD
AND
BRIEFS

Nos. 11-338, 11-347

In The
Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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September 4, 2012

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INTEREST OF *AMICI CURIAE*

For over three decades, federal and state agencies, courts, and private parties understood that the Environmental Protection Agency's ("EPA") Silvicultural Rule, 40 C.F.R. § 122.27, exempted stormwater runoff from forest roads from the requirement of a National Pollutant Discharge Elimination System ("NPDES") permit, regardless of whether that stormwater is collected via man-made culverts, ditches, or channels. Although Amici States agree that stormwater runoff from forest roads should be managed to minimize the amount of sediment delivered to a state's waters during storm events, Congress recognized that water pollution resulting from these sources is best regulated at a local level. Congress ultimately left it to the states to determine the approaches to non-point source pollution management from forest roads. In that vein, 33 U.S.C. § 1329 requires states to develop programs for non-point source pollution and report to the EPA on the best management practices ("BMPs") that are being used to reduce water pollution from forest roads. *See generally* 33 U.S.C. § 1329.

Amici States have followed Congressional and EPA's directives. Nationally, 16 states have adopted non-point source programs that are regulatory, 22 have non-regulatory approaches, and the remaining states have elements of both. *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Schilling, E.B., G.G. Ice, T.B. Wigley, and A.A. Lucier, National Council for Air and Stream Improvement, Inc., Research

Triangle Park, N.C. (2009). States have worked to ensure individuals and companies that conduct timber harvesting will implement BMPs for forest road construction and maintenance in order to protect water quality and wildlife. The Ninth Circuit's decision effectively invalidates the EPA's Silvicultural Rule by determining that stormwater runoff collected in ditches and culverts is a point source of pollution, rather than a non-point source of pollution. Compounding the problem, the Ninth Circuit further ruled that timber harvesting constitutes an "industrial activity" under Phase I of the EPA's stormwater permit program and the roads that are a necessary component of timber harvests require NPDES permits. If the Ninth Circuit's decision is not overturned by this Court, landowners and loggers will be required to obtain NPDES permits from the EPA or the states. A sudden shift to a fully regulated, permit-based approach to forest road management is a significant departure in how forest roads have been managed for decades under BMPs, and this permit-based approach will further burden state agencies that are already struggling with meeting the current demands of the NPDES program. Forest road stormwater is already effectively managed under state BMP programs, and thus these new burdens will fail to achieve any significant benefit to the environment. Because the Ninth Circuit's decision fundamentally impacts and rewrites existing state programs, Amici States urge this Court to reverse the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

1. The Respondent challenged EPA's Silvicultural Rule in an action brought under the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365. But, a challenge to regulations promulgated by the EPA must be filed pursuant to 33 U.S.C. § 1369, not 33 U.S.C. § 1365. As a matter of law, it is improper to seek to invalidate an EPA rule pursuant to a citizen suit under 33 U.S.C. § 1365.

2. The EPA has consistently maintained that, pursuant to the Silvicultural Rule, "ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 [point source] permit program." 41 Fed. Reg. 6,282 (Feb. 12, 1976). The Ninth Circuit erred by failing to give deference to the EPA's reasonable, articulated, and longstanding position that forest roads need not be permitted under the NPDES program.

3. Under the later Phase I stormwater program, Congress required stormwater runoff associated with "industrial activity" to be permitted under the NPDES program. Generally, timber harvesting operations required to obtain formal permits are those "engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials." 55 Fed. Reg. 47,990, 48,008 (Nov. 16, 1990). Forest roads do not fit within these categories and were not intended to be regulated under the Phase I program at all. The Ninth Circuit erred by failing to

give deference to the EPA's reasonable, articulated, and longstanding position that forest roads need not be permitted under the NPDES program.

4. Forestry practices in the United States are conducted under the most comprehensive program of BMPs of any land use activity in the nation. Some Amici States employ mandatory BMPs administered by state foresters or forest practice boards or commissions. Other Amici States employ non-regulatory BMPs that are developed or approved by state agencies, together with landowner education to encourage compliance, and authority for agencies to take action against landowners who do not comply. If the Ninth Circuit decision in this case is not reversed by this Court, the states' established BMP programs will be vacated in favor of an NPDES permitting regime, and the burden of NPDES permitting is substantial.

ARGUMENT

I. The Ninth Circuit's decision that an EPA rule can be invalidated in a citizen suit is incorrect as a matter of law and has negative impacts on each state's regulatory programs.

Congress allowed judicial review of EPA rules under the CWA when it provided that "[a]ny interested person" may seek review of an EPA action in approving or promulgating any effluent limitation or other limitation. 33 U.S.C. § 1369. *See, e.g., NRDC v. EPA*,

966 F.2d 1292, 1296-97 (9th Cir. 1992). Review of an EPA rule must be brought within "120 days from the date of such determination, approval, promulgation, issuance, or denial. . . ." 33 U.S.C. § 1369(b)(1). Challenges to EPA rulemakings must be brought in the Circuit Court of Appeals. 33 U.S.C. § 1369(b)(1). Congress provided a separate section in the CWA for individuals to enforce EPA regulations. Under 33 U.S.C. § 1365 a citizen may bring a civil action in district court against any person or agency alleged to "be in violation of (A) an effluent standard or limitation under this subchapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1369(a)(2). At its core the purpose of a citizen suit is to enforce regulations, not invalidate them. *Del. Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 265 (3d Cir. 1991).

In this case, there is little doubt that Respondent sought to ultimately invalidate EPA's Silvicultural Rule when it filed its citizen suit. The Ninth Circuit permitted review under 33 U.S.C. § 1365, by ruling that the Silvicultural Rule was ambiguous, was susceptible to different readings, and therefore could be interpreted under the CWA's citizen suit provision. Contrary to the Ninth Circuit's reasoning, the Ninth Circuit did not simply "interpret" EPA's Silvicultural Rule. The Ninth Circuit effectively invalidated EPA's Silvicultural Rule. Such a result can be pursued only pursuant to 33 U.S.C. § 1369, not 33 U.S.C. § 1365.

Congress clearly stated its intent to bar challenges to EPA rulemaking in citizen suits by stating that the judicial review provision in 33 U.S.C. § 1369(b)(2) is exclusive. According to Congress, if review of an EPA action "could have been obtained under paragraph (1) [the rulemaking judicial review provision of the CWA] that action "shall not be subject to judicial review in any civil or criminal proceedings for enforcement." 33 U.S.C. § 1369(b)(2). Clearly, Congress required a challenge to regulations promulgated by EPA to be filed pursuant to 33 U.S.C. § 1369, not 33 U.S.C. § 1365.

This suit was brought not as an action against EPA, but instead as an action against the State of Oregon and those entities that owned, built, and maintained forest roads. By determining that EPA's rules may be challenged, and invalidated, in a citizen suit arising under 33 U.S.C. § 1365 rather than 33 U.S.C. § 1369, the Ninth Circuit effectively placed the uniformity of the CWA's NPDES program in jeopardy. Congress' intent to limit challenges to EPA rulemaking to 33 U.S.C. § 1369 has sound underpinnings. In this case, as in the majority of citizen suit cases, EPA was not a named party. Because EPA is not required to be a party to a citizen suit, EPA is not legally obligated to take action if a court overturns or invalidates one of its rules in a citizen suit case. By determining that EPA rules may now be reinterpreted by the court and in effect overturned in a citizen suit, the Ninth Circuit has created a scheme whereby multiple citizen suits, in every state, may be filed in an effort to

challenge an existing, longstanding EPA rule. This, in turn, could result in various interpretations of an identical EPA rule, undermining the uniformity of environmental law sought by Congress by its passage of the CWA. In contrast, if the Silvicultural Rule had been challenged pursuant 33 U.S.C. § 1369, EPA would have been a named party, and would have had to engage in rulemaking to correct any improprieties found by a court. Uniform rulemaking by EPA, with the necessary component of public participation within the rulemaking process, benefits the states, the regulated community and the purpose of Congress' passage of the CWA. This Court should reverse the Ninth Circuit and limit challenges to EPA rulemaking as Congress intended – through the provisions of 33 U.S.C. § 1369.

II. The Ninth Circuit failed to defer to the EPA's reasonable interpretation of the Clean Water Act.

A. The Silvicultural Rule

Congress enacted the CWA in 1972. The CWA provided EPA with the authority to implement a consistent program throughout the U.S. designed to protect the waters of the nation from pollution. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (CWA's objective was "authorizing EPA to create and manage a uniform system of interstate water pollution regulation."). Prior to the enactment of the CWA, protection of the waters was handled by individual states. *See* S. Rep. No. 92-414, 1-11 (1971).

The CWA's cornerstone is a permitting requirement for "point source" discharges, *i.e.*, discharges of pollutants through "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft. . . ." 33 U.S.C. § 1362(14). This permitting program is the NPDES permitting program.

The EPA promulgated rules to implement the NPDES permitting program, including rules clarifying when permits were and were not required. One of these rules is known as the Silvicultural Rule. The Silvicultural Rule states:

> (a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.
>
> (b) *Definitions.*
>
> (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include non-point source silvicultural activities* such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control,

> harvesting operations, *surface drainage, or road construction and maintenance from which there is natural runoff.* However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233) (emphasis added).

40 C.F.R. § 122.27. Both historically and academically, silviculture – the growing and harvesting of trees – is a recognized agricultural practice. *See, e.g.*, John Gifford, *Practical Forestry* 12 (1907). With the promulgation of the "Silvicultural Rule," the EPA recognized the interconnection between silviculture and agriculture and determined that not all forestry activities were subject to the NPDES program. In 1990, the EPA published a notice in the Federal Register explaining its interpretation of this provision. *See* 55 Fed. Reg. 20,521 (May 17, 1990). In this notice, the EPA stated that stormwater discharges from forest roads, although channeled, do not constitute point sources. *Id.* Instead, these discharges were "caused solely by natural processes, including precipitation and drainage, were not otherwise traceable to any single identifiable source, and were best treated by non-point source controls." *Id.* The EPA has consistently maintained that, pursuant to this rule, "ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 [point source] permit program" 41 Fed. Reg. 6,282 (Feb. 12, 1976).

In its citizen suit Respondent alleged that the Oregon State Forester and private timber defendants were in violation of the CWA because they failed to obtain NPDES permits for stormwater runoff from logging roads that was channeled and collected in ditches and culverts. Accordingly the Ninth Circuit's analysis was limited to that question – whether stormwater from roads associated with the harvesting of timber is a point source that requires an NPDES permit under the CWA. Oregon and the private timber defendants argued that EPA's Silvicultural Rule exempted stormwater runoff from logging roads from the NPDES permitting regime. The EPA filed an amicus brief in the district court in support of Oregon and the private timber defendants supporting Oregon and their position that the Silvicultural Rule exempted stormwater discharges from forest roads from NPDES permits, even if those discharges were channeled.

In *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), this Court held deference to an agency's interpretation of its own regulation, advanced in a legal brief, was warranted unless that interpretation was "plainly erroneous or inconsistent"; conflicted with longstanding practice; or reflected evidence that an agency repeatedly changed its justification for the rule. *Id.* In this case the Ninth Circuit did not conclude that EPA's interpretation of its Silvicultural Rule was not entitled to *Auer* deference. The Ninth Circuit did not disregard EPA's interpretation because it believed that interpretation

conflicted with longstanding practice or EPA had repeatedly changed its rationale for the Silvicultural Rule. Instead, the Ninth Circuit concluded that EPA's Silvicultural Rule could reasonably be read as EPA read it – to exempt stormwater emanating from channeled logging roads from NPDES permits. (Pet. App. 36-37, 43-44).[1] The Ninth Circuit should have followed *Auer* and applied the Silvicultural Rule in a manner consistent with EPA's interpretation of that rule. Instead, the Ninth Circuit found that EPA's interpretation was unknown until it filed its amicus brief, and the EPA Silvicultural Rule conflicted with the CWA.

Despite the Ninth Circuit's claim, Amici States have not wallowed in uncertainty the last 30 years regarding the interpretation and applicability of the Silvicultural Rule. The Silvicultural Rule is clear and unambiguous – that the design, construction, use, or maintenance of forest roads is an activity that does not require an NPDES permit. The intent of the EPA to define these activities as non-point sources and exempted from the NPDES permitting program can be found in both the text of the Silvicultural Rule and its regulatory preamble. Indeed, the EPA's singular position on this topic was acknowledged by the Ninth Circuit, despite its later finding of an alleged ambiguity. The Ninth Circuit stated that, under the Silvicultural Rule, non-point sources, *i.e.*, those that require

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[1] Cited to Petitioners, Decker, *et al.*, Appendix.

no NPDES permit, included discharges of natural runoff even if such discharges are channeled and controlled through a discernible, confined, and discrete conveyance.

Absent an *Auer* analysis, the Ninth Circuit did not have the leeway to interpret the Silvicultural Rule differently from EPA. And despite Respondent's, and now the United States', insistence that the Ninth Circuit engaged in an interpretation of the Silvicultural Rule the opposite is true. The Ninth Circuit determined the Silvicultural Rule was in conflict with the CWA by stating "we hold that the Silvicultural Rule does not exempt from the definition of point source discharge under § 512914 stormwater runoff from logging roads" that is collected and channelized. (Pet. App. 37). The Ninth Circuit erred by invalidating an EPA rule in a citizen suit. Disguising this rule invalidation as an alternate interpretation that effectively guts the EPA's intent of the rule while leaving the rule standing is a backdoor attempt to avoid the provisions of 33 U.S.C. § 1369, and this Court should reverse.

B. The 1987 Stormwater Amendments

Despite the best of intentions, the NPDES program did not fully eliminate water pollution or return the nation's waters to their pristine state. Recognizing such, Congress passed an amendment to the CWA in 1987. *See generally* 33 U.S.C. § 1342(p). In this amendment Congress mandated a two-phase approach.

Phase I concentrated on five distinct categories of stormwater discharges. 33 U.S.C. § 1342(p)(2). For these specific categories of discharges, NPDES permits were to be required. Phase II required the EPA to consider, over time, other stormwater discharges that had the potential to adversely affect water quality. 33 U.S.C. § 1342(p)(6).

Among the Phase I stormwater discharges to be regulated through the issuance of NPDES permits were those associated with "industrial activity." 33 U.S.C. § 1342(p)(2)(B). Despite the inclusion of this category, Congress provided the EPA with no definition of the term. Instead, EPA was directed to "establish regulations setting forth the permit application requirements for [such] stormwater discharges. . . ." 33 U.S.C. § 1342(p)(4)(A). The EPA's 1990 regulations defined a "storm water discharge associated with industrial activity" as a "discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14) (2011). "Standard Industrial Classifications" or "SIC codes," as originated by the Office of Management and Budget, were used by the EPA to further designate the specific activities deemed to be industrial in nature.

The Ninth Circuit's error in effectively invalidating the Silvicultural Rule was compounded by its similar invalidation of the stormwater discharge rule. Again, the Ninth Circuit never conducted an *Auer* analysis of the stormwater discharge rule. Instead,

while recognizing that the text of the rule made clear that EPA intended to exclude discharges from activities defined by the Silvicultural Rule from the definition of industrial activity requiring a stormwater permit, it held that "the 1987 amendments to the CWA do not exempt from the NPDES permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers." (Pet. App. 47). Removing every last vestige of uncertainty that the Ninth Circuit invalidated the stormwater discharge rule too, the court further stated that "[w]e have just held that § 402(p) provides that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels is a 'discharge associated with industrial activity,' and that such discharge is subject to the NPDES permitting process under Phase I." (Pet. App. 48). In reaching this conclusion, the Ninth Circuit did not wholly consider the EPA regulations at issue. If it had, the Ninth Circuit would have found SIC code 24 to be less-encompassing than interpreted. The EPA explained that the "[e]stablishments identified under SIC 24 . . . are engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials." 55 Fed. Reg. 47,990, 48,008 (Nov. 16, 1990). Logging, as opposed to these truly industrial activities, was to be addressed under different regulatory provisions altogether. *See* 40 C.F.R. § 122.27.

The EPA explained in its amicus brief filed with the district court that it had separated discharges associated with "industrial activity" from discharges associated with "silvicultural activity." It further distinguished between "silvicultural point sources" and discharges fitting within its existing Silvicultural Rule. The distinctions noted by EPA in its amicus brief were not plainly erroneous, inconsistent, nor in conflict with longstanding practice and were entitled to *Auer* deference, deference which the Ninth Circuit did not accord. The Ninth Circuit erred by invalidating the stormwater rule in a citizen suit. The regulatory structure for the management of forest roads adopted by EPA should be allowed to stand. The decision of the Ninth Circuit, on the other hand, should be reversed.

III. The Ninth Circuit's Decision Has Significant Consequences On Existing State BMP And NPDES Programs

A. The States' Best Management Practices

Forestry activities generally involve numerous small operations occurring sporadically over large amounts of space and long periods of time. Complicating the situation is the fact that different forests, even those in close proximity with one another, may have very different characteristics in terms of topography, tree species, soil types, wildlife habitat, geology and hydrology. In order to be effective, the approach to protecting the environment from forestry activities must be adapted to local conditions and circumstances.

Congress recognized that non-point source pollution is unique to each state when it added section 319 to the CWA in 1987. *See* 33 U.S.C. § 1329. Section 319 required states to develop plans for any non-point source activities that are causing a state's water to fall short of the state's respective water quality goals. *See* 33 U.S.C. § 1329. Together, sections 218 and 319 authorize the states to obtain federal funding to manage non-point source pollution, with oversight from EPA. 33 U.S.C. §§ 1298 & 1329. Amici States have followed Congressional and EPA directives.

Forestry practices in the United States are now conducted under the most comprehensive program of BMPs of any land use activity in the nation. Some Amici States employ mandatory[2] BMPs administered by state foresters or forest practice boards or commissions. National Council for Air and Stream Improvement, Inc., *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Technical Bulletin No. 966 (2009). Other Amici States employ non-regulatory BMPs[3] that are developed or approved by state agencies, with landowner education to encourage compliance,

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[2] These sign-on states have mandatory BMP programs: Alaska Code 41.12.055(d) and the implementing regulation is 11 AAC 95.295; Idaho Code 38-1301 *et seq.*; Kentucky KRS 149.344; New Hampshire; Ohio Admin. Code § 1501:15-5-12 (2010); and South Carolina.

[3] These sign-on states have non-regulatory BMP programs: Arkansas, Alabama, Florida, Georgia, Maine, Michigan, Mississippi, Tennessee, Virginia, and Wyoming.

and authority for agencies to take action against landowners or foresters who do not comply. *See, e.g.*, Florida Division of Agriculture and Consumer Services, *Silvicultural Best Management Practices* (2008). BMPs vary among Amici States for good reason. A BMP that is appropriate for a coastal pine forest in Georgia may be wholly inadequate for a temperate rainforest in Oregon, or an Ozark mountain forest in Arkansas. But while individual BMPs may vary, the single goal of protecting the waters of the nation is served in consistent fashion. Indeed, in order to advance the laudatory goals of the CWA, the BMPs must, of necessity, be designed in response to local conditions.

In spite of their variations, Amici States' BMPs share a number of attributes because each state's BMPs are based upon a common set of science-based principles. National Council for Air and Stream Improvement, Inc. *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Technical Bulletin No. 966 (2009). BMPs will generally be designed to 1) minimize soil compaction; 2) separate exposed soils from surface waters; 3) separate fertilizer and herbicide application from surface waters; 4) inhibit hydraulic connections between bare ground and surface waters; 5) provide forested buffers around watercourses; and 6) properly plan, locate, and design roads to have a minimal impact on soil erosion and water quality. R. Olszewski & C.R. Jackson *Best*

Management Practices and Water Quality, National Council for Air and Stream Improvement, Inc. (2006).

Regardless of each state's chosen approach, BMPs and non-point source pollution prevention programs implemented by Amici States are subject to EPA oversight and approval. *See* 33 U.S.C. § 1329. States whose water quality inventories fail to demonstrate continued improvement over time are subject to closer scrutiny and review by EPA, and poor performance can result in grant funding reductions. In short, BMPs have become an accepted, well-understood, documented, approved and successful method of protecting water quality in the United States and, in particular, in the nation's forests.

There are hundreds of millions of privately and publicly owned acres of forest land in the United States, with millions of miles of forest roads having some form of water conveyance, or channeling, associated with them that are currently managed by Amici States' BMP programs. A timber harvest does not occur overnight. Each site designated for timber harvesting and reforestation is the culmination of several years of multiple resource assessment and detailed project planning. Over the last three decades each Amici State has expended thousands of hours and millions of dollars developing and implementing their respective BMP programs. The states' BMP programs have been developed by certified silviculturists, and these individuals meet certain standards of professional knowledge, skills and experience in multiple-use silviculture activities. In order to meet

EPA standards, Amici States provide training and certification in soils and watershed management, and while these individual BMP specialists are knowledgeable regarding the practices and procedures necessary to comply with sections 218 and 319 of the CWA, they are often completely unfamiliar with the requirements of the CWA's NPDES program. A sudden shift to a fully regulated, permit-based approach to forest road management is a significant departure in how forest roads have been managed for decades under BMPs, and this permit-based approach will further burden state agencies that are already struggling with meeting the current demands of the NPDES program. If the Ninth Circuit decision in this case is not reversed by this Court, the states' established BMP programs will be vacated in favor of NPDES permits, and the burden of NPDES permitting is substantial.

B. The States' Individual NPDES Programs

Amici States are concerned about the chaos that will result at the state level if hundreds of thousands of applications for new NPDES permits related to forest roads are filed within a short timeframe. Since the inception of the NPDES program, the number of facilities required to have NPDES permits has quadrupled. *Protecting the Nation's Waters Through Effective NPDES Permits*, Office of Water, EPA-833-R-01-001, June 2001. This growth is the result of a number of changes to the program including the reauthorization of the CWA in 1987, which significantly

expanded the scope of the NPDES program. *Id.* Moreover, the NPDES permitting scheme is burdensome to administer. As specified in 40 C.F.R. § 124, there are a number of major steps the states' permit writers must follow to develop and issue an individual NPDES permit.

The NPDES permitting process begins when the permittee submits an application. After receiving the application and making a decision to proceed with the permit, the permit writer reviews the application for completeness and accuracy. When the application is complete, the permit writer, using the application data, begins to develop the draft permit and the justification for the permit conditions. *U.S. EPA NPDES Permit Writers' Manual*; U.S. Environmental Protection Agency, Office of Water, December, 1996; EPA-833-B-96-003. The first major step in the development process is deriving technology-based effluent limits. Following this step, the permit writer derives effluent limits that are protective of state water quality standards. The permit writer then compares the technology-based effluent limits with the water quality-based effluent limits and applies the more stringent limits in the permit. The decision-making process for deriving limits is documented in the permit fact sheet. Following the development of effluent limits, the permit writer develops appropriate monitoring and reporting conditions, develops facility-specific special conditions, and includes standard conditions that are the same for all permits. *U.S. EPA NPDES Permit Writers' Manual*; U.S. Environmental

Protection Agency, Office of Water, December, 1996; EPA-833-B-96-003. After the draft permit is complete, the permitting authority provides an opportunity for public participation in the process. A public notice announces the permit and interested parties may submit comments regarding the draft permit. Based on the comments, the states then develop the final permit, with careful attention to documenting the process and decisions for the administrative record, and issue the final permit to the facility. *U.S. EPA NPDES Permit Writers' Manual*; U.S. Environmental Protection Agency, Office of Water, December, 1996; EPA-833-B-96-003.

The states' permit writers spend a majority of their time deriving appropriate effluent limits based on applicable technology-based and water quality-based standards. Water quality goals for a water body are defined by state water quality standards. A permit writer may find, by analyzing the effect of a discharge on the receiving water, that technology-based permit limits are not sufficiently stringent to meet these water quality standards. Permit writers must consider the impact of every proposed surface water discharge on the quality of the receiving water.

The CWA provides that NPDES permits may not be issued for a period of longer than five (5) years and the states already face a significant backlog of permit renewals. Permittees that wish to continue discharging beyond the five-year term must submit complete applications for permit renewal at least 180 days prior to the expiration dates of their permits. If the

state permitting authority receives a complete application, but does not reissue the permit prior to the expiration date, the existing permit is considered "administratively continued." Permits that have been administratively continued are considered to be "backlogged." Since 1999, EPA has tracked the issuance status (the number of NPDES permits and the percent current) and set goals for states and EPA Regions to achieve a current rate of ninety (90) percent. According to EPA, in December of 2009 only one EPA Region, Region 6, was at the 90-percent "current" status for major individual NPDES permits. Only two Regions, Region 5 and Region 6, met the current status for individual minor permits.

The Ninth Circuit's decision that channeled forestry roads require NPDES permits could not have come at a more inopportune time. While Amici States are being tasked with an ever-growing list of EPA initiatives, the supporting flow of federal and state dollars to fund these new government initiatives continues to diminish. *EPA FY 2012 Budget Hearing Before the Senate Interior, Environment and Related Agencies Subcommittee,* 112th Cong. (2011). Amici States have legitimate concerns about the overwhelming number of regulations they are facing from new EPA initiatives that are far outstripping the financial support received from EPA for implementation. Adding a new permit requirement for ditches and culverts along millions of miles of forest roads will swamp already burdened states at a time when resources to administer the NPDES permitting programs are

continuing to shrink and the states are continuing to fall behind.

C. NPDES General Permits Are Not The Solution

In contrast to the Ninth Circuit's suggestion, and a current EPA proposal, general permits are not the simple "cure" to the Ninth Circuit's decision in this case. In a recent Federal Register notice, EPA stated that it was considering regulating a subset of stormwater discharges from forest roads under its Phase II stormwater rulemaking authority. 77 Fed. Reg. at 30,349; *see* pp. 17-18. On May 23, 2012, EPA issued a formal notice in the Federal Register indicating its intent to consider "proposed revisions to its Phase I stormwater regulations (40 CFR 122.26) to specify that stormwater discharges from logging roads are not included in the definition of 'storm water discharge associated with industrial activity.'" 77 Fed. Reg. at 30,474. EPA's proposed revisions to its current regulatory scheme suggest that EPA intends to issue a new rule in the future that stormwater associated with forest logging roads be permitted pursuant to the Multi-Sector General Permit (MSGP) regulatory scheme, 73 Fed. Reg. 56,572 (Sept. 29, 2008). *See* Letter from Nancy K. Stonger, Acting Assistant Administrator, EPA, to Congressman Kurt Schrader (July 1, 2011). However, the MSGP is not a panacea to the Ninth Circuit's improper invalidation of EPA's Silvicultural and stormwater rules for two reasons. First, the MSGP is available only in states where EPA is the permitting authority. According to EPA,

forty-four (44) states and one territory are authorized to implement the NPDES program. *Protecting the Nation's Water Through Effective NPDES Permits*, EPA-833-R-01-001, June 2001. The overall burden of implementing and administering a general permitting scheme would, similar to the implementation of individual NPDES permits, rest with the states. But more importantly, although admittedly less onerous than administering the individual NPDES program, the issuance of a general permit is also not a simple undertaking. The process for developing and issuing a general NPDES permit requires a state's permitting authority to first identify the need for a general permit by collecting data demonstrating that a group, or category, of discharges has similarities that warrant a general permit. In this case, each state would have to conduct an inventory of the thousands, and in some instances millions, of miles of forest roads that may exist in each state. Once that inventory is complete, each state permitting authority would be required to consider the following to decide whether a general NPDES permit would be appropriate:

1. Are there a large number of facilities to be covered?

2. Do the facilities have similar production processes or activities?

3. Do the facilities generate similar pollutants?

4. Do only a small percentage of the facilities have the potential for violation of a state's water quality standards?

The remaining steps of the permitting process mirror those for individual NPDES permits. The permitting authority develops the draft permit and fact sheet, issues a public notice, addresses public comments, documents the issues for the administrative record, and issues the final permit. After the general permit has been issued, facilities that wish to be covered under the general permit generally submit a Notice of Intent to the state permitting authority. The permitting authority may then either request additional information describing the facility, notify the facility that it is covered by the general permit, or require the facility to apply for an individual NPDES permit. *U.S. EPA NPDES Permit Writers' Manual*; U.S. Environmental Protection Agency, Office of Water, December, 1996; EPA-833-B-96-003. The Ninth Circuit's suggestion and EPA's consideration of that suggestion, that general permits provide a simple solution to the Ninth Circuit's ill-reasoned decision to invalidate EPA's Silvicultural and stormwater rules is incorrect.

CONCLUSION

Based upon the above analysis, Amici States respectfully request this Court to reverse the Ninth Circuit.

Respectfully submitted,

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Nos. 11-338 and 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DR. KEVIN BOSTON AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

Dr. Kevin Boston is an associate professor in the Forest Engineering, Resources, and Management Department at Oregon State University, where he teaches courses in Forest Road Engineering and Forest Road System Management. He is engaged in active research on the physical properties of various materials used in logging road construction, and has authored or co-authored numerous publications relating to forest road management. Dr. Boston has a Bachelor of Science in Forestry from Humboldt State University and a Masters of Forestry and a PhD in Forest Engineering from Oregon State University, and is a Registered Professional Forester in California and Professional Engineer, registered in Oregon. Prior to working at Oregon State University, Dr. Boston worked as an assistant professor at the University of Georgia and as a lecturer at the New Zealand School of Forestry at the University of Canterbury. He has spent many years working in the timber industry in New Zealand and the western United States.

Dr. Boston believes that the principles of logging road engineering and the processes of sediment generation and delivery from logging roads have not

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[1] All counsel of record have consented to the filing of this brief. Petitioners Georgia-Pacific West, Inc., et al., Petitioners Decker, et al., and Respondent have all filed blanket consents. No counsel for any party authored this brief either in whole or in part. No persons other than *amicus* or its counsel has made any monetary contribution to the preparation or submission of this brief. Dr. Boston submits this brief on his own behalf and not on behalf of his employer Oregon State University.

been adequately explained in the other briefs before the Court. A sound understanding of these concepts is necessary to inform the Court's decision about whether sediment generated from the movement of heavy machinery and the hauling of timber on logging roads and conveyed to waters of the United States via engineered drainage systems constitutes a point source discharge of industrial stormwater.

INTRODUCTION AND SUMMARY OF ARGUMENT

The main purpose of this brief is to explain relevant facts surrounding the science and engineering of logging roads and their drainage systems.[2] These facts demonstrate that the primary purpose of these roads is to facilitate industrial logging operations; that the pipes, ditches, and channels associated with these roads are designed to prevent road washout and failure that would disable logging operations; and that these drainage structures can be a significant source of water pollution. 2JA 90. In short, the sediment pollution caused by the creation and use of logging roads is not natural in origin and the choices made in the planning, design, construction, and use of logging roads can determine the volume of sedi-

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[2] In accord with the usage adopted by Respondent, this brief uses the term "logging roads" to refer to forest roads that are designed and constructed for heavy vehicle traffic and used for active timber cutting and hauling operations. The distinction between active logging roads and other forest roads is a common one, recognized, for example, in the Oregon regulations' definition "active roads," which "are roads currently being used or maintained for the purpose of removing commercial forest products." Or. Admin. R. 629-600-0100(3).

ment pollution that reaches rivers and streams. As a result, when this sediment pollution is directly discharged into waters of the United States through man-made ditches, pipes, culverts, and channels, it should be subject to the National Pollutant Discharge Elimination System (NPDES) permitting program under section 402 of the Clean Water Act, 33 U.S.C. § 1342.

ARGUMENT

I. Large-Scale, Modern Forestry is an Industrial Activity.

The active logging roads that are the subject of this litigation are integral parts of large-scale, complex, industrial operations. Although these logging roads may eventually be used for other purposes—such as recreation and fire suppression—their primary purpose is to enable the harvesting and extraction of timber and other forest products. This purpose determines the decisions made at each stage of the process of planning, designing, constructing, operating, and maintaining these roads.

Logging roads are built to safely and efficiently bear the heavy vehicle traffic necessary for modern industrial forestry. This traffic involves both moving the huge machines used in cutting and processing trees into the forest and removing timber from the forest on massive logging trucks. Roads can also be the site of some of the timber processing, as tree limbs are removed and stems are cut into logs for transport to the mill.

Paradoxically, these heavy-duty logging roads—built to safely bear massive equipment—are also

extremely vulnerable. Constructed of dirt and built along steep and often unstable slopes, logging roads are susceptible to washout and failure. In order to protect these roads, which are indispensible to the logging process, logging companies design and install complex networks of drainage systems. These pipes, ditches, and channels are intended to fulfill an essential job: to preserve the integrity of the road by carrying water away from its surface.

The basic steps involved in getting timber "from the 'stump to mill'" are roadbuilding, felling, extraction, processing, loading, and trucking.[3] Each step in this industrial process is typically carried out by a specialized piece of heavy machinery and/or by individuals with a specialized skill. As described in detail below,[4] the first step, foundational to all others, is roadbuilding, which involves clearing the road with bulldozers, smoothing the surface with graders, and installing drainage structures. Once the road is built, the "felling" (cutting down) of trees is often performed by mechanical harvesters—tracked or wheeled machines that can weigh more than 30 tons. The operator of one of these machines, who sits in a

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[3] Virginia Tech University, Dep't of Forestry, *Harvesting Process*, http://web1.cnre.vt.edu/harvestingsystems/HarvestingProcess.htm (last visited October 18, 2012). For illustrations and descriptions of the types of machinery described below, see LOREN D. KELLOGG, PETE BETTINGER & DON STUDIER, TERMINOLOGY OF GROUND-BASED MECHANIZED LOGGING IN THE PACIFIC NORTHWEST (1993), *available at* http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/7615/RC1.pdf.

[4] See *infra* Part III.

cab, uses a huge claw-like arm to grab the entire tree, cut it off from the stump, and stack it with others on the ground. On steep ground or areas with large trees, this task may be accomplished by highly-skilled timber fallers using chainsaws. Next, the tree is "extracted" (moved) to a landing or roadside. To carry out this step, the tree is either carried on a machine called a forwarder or dragged by a different machine called a skidder. On steep slopes, machines similar to cranes, called yarders, are used to haul logs on a system of cables. Typically, at the landing or roadside, another machine called a delimber or people with chainsaws are used to cut off the branches and the stem is manufactured into the preferred log lengths. A log loader is then used to lift the logs onto a truck for transport to the mill.

Given the size and sophistication of the machinery and the skill of the individuals involved at each step of this process, it is not surprising that a classic text on logging practices describes a modern industrial forestry operation as "a loose grouping of mobile factories. The manufacturing process taking place in those factories is not unlike the process taking place in other extractive industries such as coal mining and oil production."[5]

All of this massive machinery is delivered into the heart of a forest by means of logging roads. The logging trucks—with a total weight between approximately 80,000 and 105,000 pounds depending on state regulations—then use the roads to carry the

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[5] STEVE CONWAY, LOGGING PRACTICES: PRINCIPLES OF TIMBER HARVESTING SYSTEMS 48 (1976).

timber to the mill for processing. As described in the following section, the cumulative impacts of this intensive use of the forest in support of industrial logging operations is significant water pollution.

II. Active Logging Roads Have Significant Impacts on Water Quality.

Logging roads are significant sources of pollution—the most important source of forestry-related sediment pollution. 2JA 119, 128. In particular, the Environmental Protection Agency (EPA) has concluded that "up to 90% of the total sediment production from forestry operations" comes from logging roads.[6] Furthermore, a report commissioned by EPA concluded that "forestry-related sediment is a leading source of water quality impairment to rivers and streams nationwide."[7] The magnitude of these impacts is directly related to the decisions that are made at each stage of the development and use of logging roads.[8] As a result, these impacts are also the direct result of logging roads' function in the overall industrial logging operation.

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[6] EPA, *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* 27 (1993).

[7] GREAT LAKES ENVTL. CTR., NATIONAL LEVEL ASSESSMENT OF WATER QUALITY IMPAIRMENTS RELATED TO FOREST ROADS AND THEIR PREVENTION BY BEST MANAGEMENT PRACTICES 2 (2008) [hereinafter NATIONAL LEVEL ASSESSMENT] (citing EPA's 2000 and 2002 National Water Quality Inventories).

[8] Or. Dep't of Forestry, Technical Report # 17, *Wet Season Road Use Monitoring Project: Final Report* 24 (2003), *available at* http://www.oregon.gov/odf/privateforests/docs/roaduse.pdf.

Not all of the sediment generated by logging roads enters streams. Indeed, in a properly planned, designed, constructed, and maintained logging road, virtually all of the sediment will be discharged overland. 2JA 78. As a practical matter, however, the amount of sedimentation actually delivered to streams from logging roads can be staggering.

An imaginative exercise based on the actual results of removing abandoned logging roads from the landscape may help sharpen the problem. In 2008, in recognition of the impact of logging roads on water quality, Congress created the Legacy Roads and Trails Remediation Program. Recently, the U.S. Forest Service's Rocky Mountain Research Station completed research measuring the benefits of this program.[9] The research group chose a notably large measurement unit: metric tons per year. The research revealed that rehabilitating just 42 miles of abandoned roads prevented delivery of 200 metric tons per year of sediment into streams—the equivalent of a 1-ton pickup truck dumping a full load of dirt and aggregate into a stream, 200 times.

Active logging roads contribute to water pollution through several mechanisms. Specifically, whether a logging road causes stream sedimentation depends on three factors: generation, mobility, and connectivity. That is, whether and how much sediment is delivered from logging roads to streams depends on

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[9] U.S. FOREST SERVICE, ROCKY MOUNTAIN RESEARCH STATION, LEGACY ROADS AND TRAILS MONITORING PROJECT UPDATE 2012, *available at* http://www.fs.fed.us/GRAIP/downloads/case_studies/2012LegacyRoadsMonitoringProjectUpdate.pdf.

(1) the amount of sediment that is generated and thus made available for delivery; (2) the mobility of the sediment (in other words, the degree to which it is able to be transported by the available water); and (3) the hydrological connection between roads and streams that allows the sediment generated and mobilized to enter the streams.

A. Sediment Generation.

Sediment is generated at the road site in a number of ways. First, a massive amount of soil is made available during the excavation of a road.[10] This soil is loosened by being torn from its anchor of vegetation. The cut-slopes are thus exposed to potentially damaging rainfall, often without any of the vegetative protection remaining. This excavated material, already loose, is made more vulnerable to erosion when it is used to make fillslopes (on the slope below a road), which can be placed at a steeper angle than native hillslopes and thus are prone to mass wasting events (landslides).[11] Such landslides frequently produce sedimentation when they reach streams, either through road-surface flows and obstruction of drainage (likely outcomes for mass wasting on cut-slopes, which are upslope from roads and thus frequently land on the road surface), or through debris flows (a likely outcome for fillslopes, which are

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[10] *See* KEITH MILLS, OR. DEP'T OF FORESTRY, FOREST ROADS, DRAINAGE AND SEDIMENT DELIVERY IN THE KILCHIS RIVER WATERSHED 2 (1997), *available at* www.oregon.gov/ODF/privateforests/docs/kilchis.pdf [hereinafter MILLS REPORT].

[11] *Id.*

downslope of roads and can be carried wholesale to a stream during a storm).[12]

Second, sediment can be generated from the rock and dirt, or "aggregate," used to surface the road. Although aggregate is used to allow for year-round use of a forest road, it also reduces the erosive potential when compared to dirt roads. Additionally, when logging trucks pass over aggregate, they can crush it into even more fine sediment.[13] Studies have found that tire crushing alone may yield from 10 to up to 500 tons of sediment per kilometer of road.[14]

Third, the creation of ruts in the surface of the roads from repeated use can disable the road's ability to shed water as it becomes concentrated in the road's surface. This water can accelerate the erosion of the road surface that can lead to an increase in sedimentation of forest roads. As a result, a rutted road can produce two to four times as much sediment as a freshly graded road.[15]

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[12] *Id.* at 5.

[13] Randy B. Foltz & Mark Truebe, *Locally Available Aggregate and Sediment Production*, 1819B TRANSP. RESEARCH RECORD 185, 190 (2003).

[14] Robert E. Bilby, Kathleen Sullivan & Stanley H. Duncan, *The Generation and Fate of Road-Surface Sediment in Forested Watersheds in Southwestern Washington*, 35 FOREST SCI. 453, 459 (1989); Leslie M. Reid & Thomas Dunne, *Sediment Production from Forest Road Surfaces*, 20 WATER RESOURCES RES. 1753, 1759 (1984).

[15] Randy B. Foltz & William J. Elliot, *Effect of Lowered Tire Pressures on Road Erosion*, 1589 TRANSP. RESEARCH RECORD 19, 19 (1997).

Finally, additional sediment is generated from ditches, which are generally surfaced not with aggregate but with more erodible native dirt. 2JA 77.

B. Sediment Transport.

The movement of water over the road transports the sediment loosened by road building and road use. For example, even a light rain falling on roads can mobilize fine sediment, direct it into the road-side ditch, and ultimately carry the sediment to streams. Rain can also saturate cut and fill slopes, causing landslides that results in materials entering streams. Stormwater rushing across a roaded landscape increases the likelihood of these sources of pollution entering streams.

Streamwater can also carry away sediment from logging roads. When a logging road crosses a stream, a pipe or "culvert" is commonly installed to carry the water under the road.[16] However, during a storm, flows may be heavier than the culvert can bear.[17] The flow may be diverted from the stream channel and into the roadside ditch or may create new channels near stream banks, where the soil is more erodible than in the established channel.[18] Or the flow may carry off soil that has been loosened as part of roadbuilding, such as that on fillslopes that eventually reaches the stream.[19]

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[16] MILLS REPORT, *supra* note 10, at 2.

[17] *Id.*

[18] *Id.*

[19] *Id.*

C. Connectivity.

Sediment may be produced by roadbuilding and use and may be transported across the landscape by water, but it only damages stream life if it reaches streams—a question of connectivity. Unfortunately, there are numerous possible points of connectivity between roads and streams. Not surprisingly, mass movement events like landslides often have momentum sufficient to deliver sediment directly to streams. More significant to this litigation, many logging roads discharge directly to rivers and streams through purposefully-designed systems of ditches. Studies in the Pacific Northwest have found that between 25% and 75% of road drainage points discharge directly to streams.[20] 2JA 122, 128.

This statistic offers both good news and bad news for stream health. The bad news is that direct drainage of sediment-laden runoff from logging roads to streams is real—and widespread. 2JA 129 (concluding that, despite "forest practices rules, which require filtering of muddy runoff through the forest floor," in practice "roads are designed and maintained for efficient delivery of water to channels"). The good news is such direct drainage is not inevitable. After all, when viewed in reverse, the statistic reveals that 25% to 75% of road drainage points *do not* discharge directly to streams. Sediment-laden water from these drains is reincorporated into the landscape before reaching streams—usually through dispersion onto the forest floor where it infiltrates into the soil matrix. Stream-friendly drains that

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[20] *Id.*; NATIONAL LEVEL ASSESSMENT, *supra* note 7, at 43-44.

avoid direct discharges into streams are thus possible, even common.

There is further good news for streams: intensive analyses of watersheds in Oregon and Idaho by the U.S. Forest Service's Rocky Mountain Research Station has revealed that 90% of the sediment that reaches streams is deposited by a mere 7% of drain points.[21] The implication is clear: stream health can be dramatically improved by regulating the small fraction of drains that act as problematic point sources.

III. Creating a Logging Road is a Complex, Multi-step Undertaking, with Implications for Sediment Pollution at Each Step.

The planning, design, construction, use, and maintenance of logging roads is a complicated process, requiring significant expertise and study. The presence of a road represents a significant manipulation of the forested landscape; the road is engineered to achieve a particular purpose. Key issues in this process include the selection of a road surface shape and the design and placement of drainage structures to transport water away from the surface of the road as efficiently as possible. By moving the water in this way, the goal of forest road engineers is to maintain the usefulness of the road as a conduit for logging equipment and timber extraction, as well

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[21] Wildlands CPR, *Road Reclamation: Measuring Success* 6 (2012) (summarizing Forest Service results), *available at* http://www.wildlandscpr.org/files/GRAIP%20Report%20Wildlands%20CPR_0.pdf.

as to reduce the impact of the road on the environment.

Successful road design requires an understanding of forest hydrology and forest erosion processes in addition to knowledge of civil, mechanical, and industrial engineering. Scientists and engineers in the discipline of forest engineering produce many papers each year, reporting research on topics such as the ability of surface aggregates to sustain mechanical and chemical breakdown, the causes of fillslope failures, the efficiency of travel routes taken by graders, and the choice and distribution of logging machinery. Even this listing—necessarily only a tiny sample of forest engineering literature—helps illuminate the complexity of the decision making involved in creating a logging road.

A. Road System Planning.

Before logging can begin, the necessary road network must be in place. Depending on the location, this process can involve the construction of new roads, the rehabilitation of old roads, or some of each. To arrive at the appropriate road network design, the landscape must be evaluated, and location alternatives must be generated and contrasted.

The feasibility of any particular logging project is dependent on the possibility of designing the necessary road network. Forest landowners will frequently plan access routes when designing timber sales, even mandating in contracts that contractors or subcontractors use specified roads and/or provide notice of their proposed hauling routes. C.A. ER 47 at 98-99.

It is essential that location decisions be made carefully: even the best design and construction decisions are often not enough to overcome a poor location. The challenge here is the same that runs through most decisions about forest roads—it lies in reconciling the need for safe, efficient roads on the one hand with the unpredictability and variability of a natural place on the other.

As a basic matter, sediment delivery to waters of the United States can be reduced by simply locating roads away from streams.[22] In fact, where the topography allows it, the link between logging roads and streams can be nearly severed by locating roads on ridgetops, which allows road runoff to be dispersed and reenter the soil.[23] Thus, an effective method is the severing of the connection between roads and streams. There are numerous other ways, however, to reduce sedimentation at the road system planning stage. For example, avoiding unstable, landslide-prone slopes not only improves safety but also reduces sedimentation.[24]

Although engineered fills (i.e. material with a known set of properties that will perform in well-

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[22] *See* NATIONAL COUNCIL FOR AIR AND STREAM IMPROVEMENT, FOREST ROADS AND AQUATIC ECOSYSTEMS: A REVIEW OF CAUSES, EFFECTS, AND MANAGEMENT PRACTICES 9 (2003) [hereinafter NCASI WHITE PAPER].

[23] *See* Jacky Croke & Simon Mockler, *Gully Initiation and Road-to-Stream Linkage in a Forested Catchment, Southeastern Australia*, 26 EARTH SURFACE PROCESSES & LANDFORMS 205, 216 (2000).

[24] *See* NCASI WHITE PAPER, supra note 22, at 9.

understood manner) are used in highway constructions, logging roads are constructed from the materials found in place. Thus there is a high variability in the engineering soil properties that are encountered during the construction of logging roads. Some may be wet or weak soils while others will be much stronger. The location of the road has the goal to place the road to avoid the weaker soils or locate on the stronger soils. However, limitations on grade and road alignment may result in the road located on less desirable construction materials.[25]

B. Road Design.

Once the location for a logging road has been selected, the road must be designed. The basic elements of a logging road, and the terminology used to describe them, are illustrated in Figure 1.

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[25] *See* Kevin Boston, Marvin Pyles & Andrea Bord, *Compaction of Forest Roads in Northwestern Oregon—Room for Improvement*, 19 INT'L J. OF FOREST ENGINEERING 24 (2008).

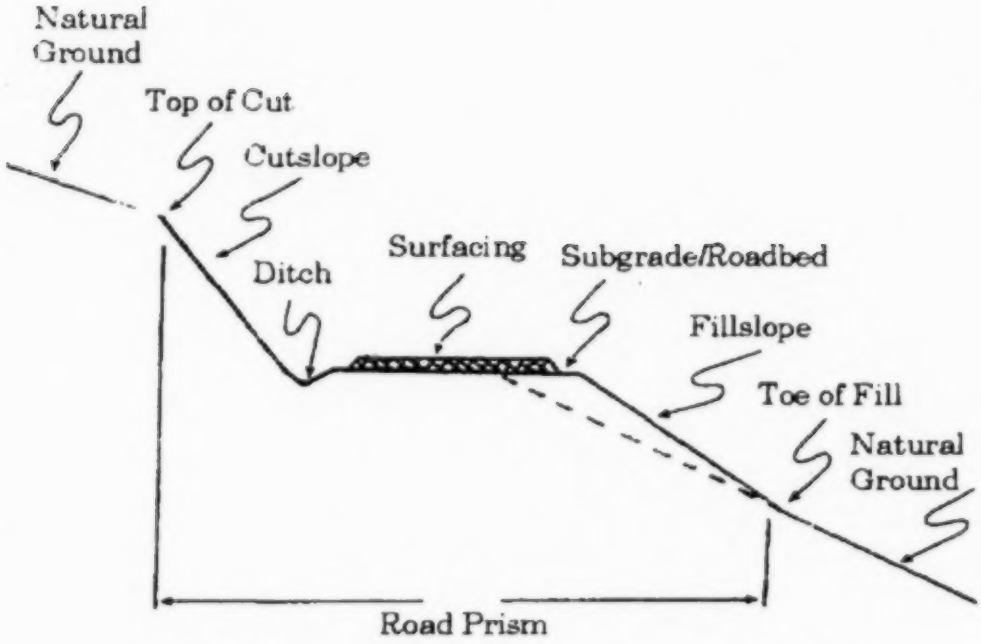

Figure 1: Logging Road Terminology [adapted from Or. Dep't of Forestry, *State Forests Program, Forest Roads Manual* (2000)].

The main adversary here is water. Water that is not quickly dispersed can cause surface erosion and rutting. These conditions hinder the safe passage of logging trucks and other heavy equipment. Landslides can also lead to road failures.[26] Thus road engineers must design roads that shed water before it can erode the road and disable the drainage system. 2JA 81, 97.

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[26] NCASI WHITE PAPER, supra note 22, at 5, 17. As Industry Petitioners acknowledge, "[a]s a practical matter, forest roads cannot be built or maintained without stormwater drainage systems: without them, the roads would wash out." Industry Br. at 34.

They accomplish this task through several means. The first is choice of road shape. A perfectly flat road will retain too much water, so the road engineer will generally design the road to be in-sloped, out-sloped, or crowned (see Figure 2).

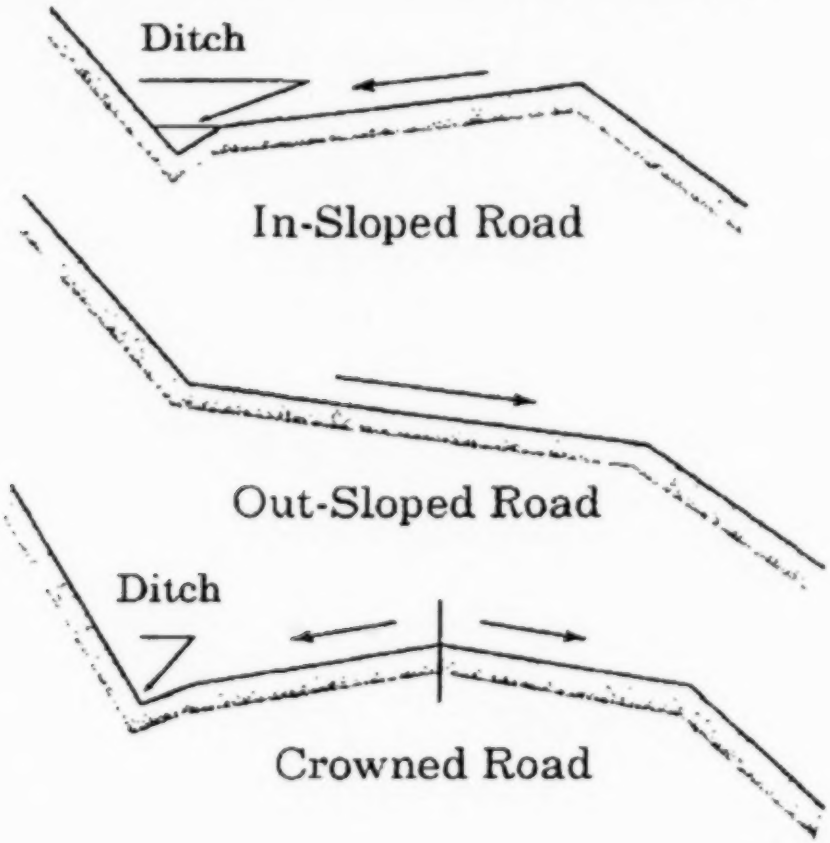

Figure 2: Logging Road Surface Shapes [adapted from Jeffry Moll, Ronald Copstead & David Kim Johansen, U.S. Forest Service, *Traveled Way Surface Shape* (1997)].

These surface shapes are designed to "encourage shedding of water from the surface before it [can]

cause unacceptable surface erosion" or ruts.[27] On in-sloped roads the surface is angled so that surface runoff is diverted toward the cutbank (the uphill side), where it can be collected in a purposely-designed drainage ditch. When rain falls, water flows off the road and into the ditch, then downslope in the ditch until it is emptied either onto the forest floor via a ditch-relief culvert or cross-drain, or emptied directly into a stream at a road-stream crossing. Currently, the best practice is to disconnect these ditches and culverts from the streams, but that is not physically possible in all circumstances. While an in-sloped surface is commonly used, it likely provides the least protection of the three road surface shapes against chronic sediment pollution discharges to waterways, as it collects the largest portion of the water from the road surface.

Out-sloped roads divert surface runoff down the hill toward the exposed edge of the roadway, thereby avoiding the concentration and channelization of runoff. Because of safety concerns, out-sloped roads are generally appropriate only for roads with gentler road grades. 2JA 81, 97.

A crowned road combines some elements of each of the other two designs, including the use of a cutbank drainage ditch. Crowned roads are the most common road shape in the areas at issue in this case. 2JA 81. Since the distance the water travels is reduced in a crowned road, this road type has the abili-

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[27] Jeffry Moll, Ronald Copstead & David Kim Johansen, U.S. Forest Service, *Traveled Way Surface Shape* 1 (1997).

ty to shed water the fastest and is often used in areas with significant rainfall.

After settling on the road surface shape, a road engineer must next decide on the drainage system to use. As indicated above, these two decisions are interrelated—the choice of an in-sloped or crowned road generally necessitates the use of a drainage ditch located on the cutbank side of the road. Ditches are built during road construction. They are typically 3-5 feet wide and 1-3 feet deep. Other drainage devices used in connection with logging roads include culverts, waterbars (diagonal berms made by cutting and filling across the road and usually associated with roads that are temporarily or seasonally closed), and dips (gentle grade reversals of the road surface). 2JA 83.

The entire purpose of these structures is to convey water from the road surface. The design objective of these drainage systems is to collect surface runoff (and intercepted subsurface flow from the cutbank) and then divert it via cross-drain structures to the forest floor. The majority of logging road drainage systems do just that. 2JA 122, 128. Sometimes, however, the water is discharged into a river or stream—those discharges, and only those discharges, are at issue in this case.

As with road system planning, many aspects of the road design decision affect sedimentation. First, poor drainage choices can be a major cause of slope failures and subsequent delivery of sediment to streams through mass wasting events (landslides).[28]

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[28] *See* Bradley T. Piehl, Robert L. Beschta & Marvin R. Pyles,

As a basic precaution, the risk of landslides, and the sedimentation that follows, can be reduced by taking care not to direct drainage onto landslide-prone slopes. 2JA 75. Even if the road has been constructed across an extended area of high landslide risk, cross-drains can still be used to redirect water to gentler slopes where water is more likely to be dispersed safely. 2JA 77.

Second, the ditches and other aspects of the drainage networks themselves also produce sediment. 2JA 77. Ditches generally have finer, more erodible soil material than stream beds.[29] 2JA 77.

However, the sedimentation impact of drainage networks can be reduced, for example by carefully designing the spacing between the ditch-relief culverts to manage water velocity.[30] 2JA 123. Logging companies can reduce sedimentation by creating a network that slows water by, for example, frequently discharging the ditches into the forest to reduce the volume and velocity of the water in ditch. Slower-moving water detaches less soil matrix and results in less sediment production.[31]

Ditch-Relief Culverts and Low-Volume Forest Roads in the Oregon Coast Range, 62 NORTHWEST SCI. 91, 91 (1988).

[29] Charles H. Luce & Thomas A. Black, *Spatial and Temporal Patterns in Erosion from Forest Roads*, *in* LAND USE AND WATERSHEDS: HUMAN INFLUENCE ON HYDROLOGY AND GEOMORPHOLOGY IN URBAN AND FOREST AREAS 165, (Mark S. Wigmosta & Stephen J. Burges eds., 2001).

[30] *See* NCASI WHITE PAPER, supra note 22, at 9.

[31] *See id.*

C. Road Construction.

At the construction stage, logging companies implement the design parameters chosen above and create a road that will support the logging project. In general, construction involves clearing the roadbed of brush, timber, and stumps; filling holes or dips; compacting the subgrades; and choosing and placing aggregate.[32]

As in the other stages of creating a logging road, the choice of construction practices strongly affects the generation of sediment pollution. As a foundational matter, construction itself can be a significant source of sedimentation. In fact, studies have shown that the highest rates of sediment production occur in the years immediately following road construction.[33] Sources of sedimentation from construction include sidecast materials—uncompacted material from excavation that is disposed on the fill side of the road. This material has low strength and is subject to gully formation or landslides when it becomes saturated.[34]

Choices made at the construction stage affect not only the amount of sedimentation that is immediately created, but also the amount of sediment that will

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[32] *See id.* at 7.

[33] Beverley C. Wemple, Frederick J. Swanson & Julia A. Jones, *Forest Roads and Geomorphic Process Interactions, Cascade Region, Oregon*, 26 EARTH SURFACE PROCESSES AND LANDFORMS 191, 191 (2001).

[34] Mary Ann Madej, *Erosion and Sediment Delivery Following Removal of Forest Roads*, 26 EARTH SURFACE PROCESSES AND LANDFORMS 175, 175 (2001).

be generated over the life of a road. For example, one method to improve forest road performance is to compact the subgrade. The subgrade is the native, base soil of a road, to which aggregate and other types of surfacing are added.[35] Compaction of the subgrade increases the strength of the road.[36] A well-compacted road can better resist catastrophic road failures, but its primary purpose is that is can resist rut formation. If the subsurface is not adequately compacted—particularly if it is composed of fine, loose soil—a portion of the aggregate can sink into the subsurface, leading to the creation of ruts.[37]

Additionally, the quality of the aggregate (crushed rock) used to surface the road significantly influences the quantity of fine sediment that is subsequently generated by the road. Native-surfaced (dirt) roads are generally the most erosive, meaning that they produce the most sediment pollution. Logging roads are usually surfaced with aggregate to allow year-round hauling. This process involves trucking in many tons of rock from a quarry. These materials are placed on the road surface and then compacted and smoothed by road building machinery.

Lower quality aggregates, which are weaker, create substantially more sedimentation because

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[35] Or. Dep't of Forestry, Forest Practices Technical Note No. 9, *Wet Weather Road Use* 8 (2003), *available at* http://www.oregon.gov/odf/privateforests/docs/wetseasonroadusefptechnote9.pdf [hereinafter *Wet Weather Road Use*].

[36] *Id.*; Boston, Pyles & Bord, *supra* note 25, at 24.

[37] *See* Boston, Pyles & Bord, *supra* note 25, at 24.

they are more vulnerable to mechanical breakdown from truck tires or to chemical breakdown from weather. Studies indicate that roads surfaced with high quality aggregate can produce one-quarter to one-twentieth the fine sediment produced by roads surfaced with poor quality aggregate.[38]

In addition, it is important to use an aggregate with the right mix, or distribution, of coarse and fine material: although some amount of fine sediment in the aggregate mix is desirable to facilitate compaction and road stability, too much is undesirable as it is easily washed off the road surface during rain events.[39]

D. Road Operation.

The use of a logging road for logging is, of course, its purpose. To sustain the road for the duration of a project, a logging company must balance considerations of traffic volume and truck weight—which can damage the road—with the need to timely transport heavy equipment into—and logs out of—the forest.

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[38] *See Wet Weather Road Use*, *supra* note 35, at 2; Randy B. Foltz, *Traffic and No-Traffic on an Aggregate Surfaced Road: Sediment Production Differences* (1996) (paper presented at the FAO Seminar on Environmentally Sound Forest Roads), *available at* http://forest.moscowfsl.wsu.edu/engr/library/Foltz/Foltz1996f/1996f.pdf.

[39] Foltz & Truebe, *supra* note 13, at 188; Randy B. Foltz, Gary L. Evans & Mark Truebe, *Relationship of Forest Road Aggregate Test Properties to Sediment Production*, *in* WATERSHED MANAGEMENT & OPERATIONS MANAGEMENT 2000 (Marshal Flug et al. eds. 2000).

Perhaps most significantly, a vast amount of sedimentation is caused by the movement of logging trucks and other heavy equipment over the road. The heavy truck traffic associated with industrial forestry increases sediment pollution in two specific ways. First, the weight of the tires passing over the road crushes the aggregate into fine sediment. Second, "vibrations from heavy traffic can move fine material up through the aggregate to the top of the road."[40] The fine sediment generated by these two mechanisms remains at the surface of the road until it is washed away by the next significant rainfall.

In one study, truck traffic levels alone explained 97% of the variation in annual sediment yield.[41] Another study demonstrated that twenty passes of a truck can produce as much sediment as is generated in a year by the road surface alone.[42] The Oregon Department of Forestry has itself concluded that "[w]et season road use can be the most significant forest practice-associated source of chronic turbidity and fine sediment in streams."[43]

This level of sediment pollution is not inevitable, however. One method of decreasing sediment production is to decrease the tire pressure of the logging

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[40] *Wet Weather Road Use*, *supra* note 35, at 4.

[41] Gary J. Sheridan & Philip J. Noske, *A Quantitative Study of Sediment Delivery and Stream Pollution from Different Forest Road Types*, 21 HYDROLOGICAL PROCESSES 387, 394 (2006).

[42] *See* Pieter J.B. Fransen, Chris J. Phillips & Barry D. Fahey, *Forest Road Erosion in New Zealand: Overview*, 26 EARTH SURFACE PROCESSES AND LANDFORMS 165, 169 (2001).

[43] *Wet Weather Road Use*, *supra* note 35, at 2.

trucks and other heavy vehicles as they pass over the logging road. Some logging trucks are manufactured with "central tire inflation," an in-cab system for adjusting tire pressures. The use of such a system to reduce tire pressures on heavy-haul vehicles when traveling over vulnerable aggregate has been shown to reduce road surface sediment production an average of 80% over a three-year study.[44] Even manually reducing the tire pressure in unmodified trucks resulted in a 45% reduction in sediment production.[45]

Lowering logging truck tire pressures decreases sedimentation in two ways. Not only does it reduce the mechanical breakdown of the aggregate, but it also minimizes the creation of ruts.[46] A rutted road produces twice to four times as much sediment as a freshly graded road.[47]

E. Road Maintenance.

After construction, the road must be periodically maintained to allow for continued use, with special care given to the smoothness of its surface, maintenance of the road shape, and the functionality of its drainage structures. Maintenance activities include surface grading and gravel supplementation; ditch cleaning; cleaning and replacement of damaged relief

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[44] Randy B. Foltz, *Sediment Reduction from the Use of Lowered Tire Pressures, in* CENTRAL TIRE INFLATION SYSTEMS: MANAGING THE VEHICLE TO SURFACE 47-52 (Soc'y of Automotive Eng'rs 1995).

[45] *Id.*

[46] *Id.*

[47] Foltz & Elliot, *supra* note 15, at 19.

culverts and stream crossing culverts; and grading of rolling dips.[48]

Maintenance choices, like choices at other steps in the process of building a logging road, can significantly reduce the rate of sedimentation. For example, overly frequent grading of the road surface can increase sediment generation.[49] Meanwhile, failure to clean plugged ditches contributes significantly to road failures.[50] In one study, blocked culverts accounted for 45 per cent of landslides caused by logging roads.[51] Blocked ditches and culverts can also cause water to travel on the landscape in other unnatural and uncontrolled ways—for example, by creating gullies along virgin slopes.[52] Erosion treatments such as spreading grass seed on the slope below roads can also be an effective way to reduce sedimentation.[53]

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[48] *See* NCASI WHITE PAPER, supra note 22, at 10.

[49] *See* Matthew Thompson et al., *Intelligent Deployment of Forest Road Graders*, 18 INT'L J. OF FOREST ENGINEERING 15, 15 (2007).

[50] *See* Piehl, Beschta & Pyles, *supra* note 28.

[51] *See* Fransen, Phillips & Fahey, *supra* note 42, at 170.

[52] Charles H. Luce & Beverley C. Wemple, *Introduction to Special Issue on Hydrologic and Geomorphic Effects of Forest Roads*, 26 EARTH SURFACE PROCESSES AND LANDFORMS 111, 112-13 (2001).

[53] *See* Walter F. Megahan, Monte Wilson & Stephen B. Monsen, *Sediment Production from Granitic Cutslopes on Forest Roads in Idaho, USA*, 26 EARTH SURFACE PROCESSES & LANDFORMS 153, 161 (2001).

In sum, the runoff that flows from logging roads into streams is not natural runoff—it is runoff whose timing, pathways, and sediment content has been modified by the presence, composition, and use of logging roads. Indeed, much of the sediment from logging roads is not soil from natural hill slopes—instead, it is material that has been exposed by the road construction process or aggregate that has been placed on the road surface to aid the logging operations and has then been ground up into fine particles by the repeated passage back and forth of heavy trucks and other equipment used in logging operations. Under these circumstances, when sediment-laden water from logging roads is carried by ditches and other man-made drainage structures and discharged into rivers or streams, it is best understood to be a discharge from a point source, generated by industrial activity, and not mere natural runoff.

CONCLUSION

The discipline of forest engineering teaches that discharges of water pollution to streams from logging roads is not inevitable. Indeed, scientists and engineers have demonstrated that discrete choices in the planning, design, construction, and use of logging roads can provide substantial protection to streams. These choices, detailed above, are both limited in number and achievable. They include locating roads on strong soils and away from streams; designing road shape and drainage networks to promote shedding of water from the road; compacting the subsurface to reduce rutting; selecting quality aggregates that resist weathering and crushing; using vehicles and tire adjustment systems that reduce pressure on

the road; and maintaining the road by, for example, clearing drainage structures to prevent clogging and seeding slopes to reduce erosion.

The function of the NPDES permitting program in this context is to stimulate sources to adopt these important practices.[54] NPDES permitting need not be burdensome. As explained by Respondent, the EPA Administrator has a variety of mechanisms, including general permitting and variances in response to economic hardship, to minimize the administrative burden of the permitting requirement. Respondent Br. at 54-56. For example, individual sources may opt in to a general permit that sets out conditions applicable to a particular geographic area merely by providing notice to the agency. Such gen-

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[54] *Amici* supporting Petitioners suggest that the impacts of stormwater runoff from logging roads are best dealt with by Best Management Practices (BMPs). *See generally* Amicus Br. of the Soc'y of Am. Foresters. While there are some benefits to BMPs, this argument misses the point that the only legal difference between a point source and a non-point source is the manner in which pollution enters waters of the United States. There can be no question that the discharges from ditches and other human-created drainage structures at issue in this case are point-source discharges. Indeed, petitioners and their *amici* do not dispute that logging roads use pipes, ditches, and channels to collect and discharge stormwater. *See, e.g.*, Industry Br. at 1, 34; State Br. at 2, 44; Amicus Br. of the Soc'y of Am. Foresters at 20; Amicus Br. of Ass'n of Or. Counties at 19-32 (discussing the numbers of culverts and ditches associated with logging roads in Oregon). Additionally, in many states BMPs are voluntary and do not provide the certainty of protection that would be accorded by conditions included in an enforceable permit. *See generally* Amicus Br. of Northwest Envtl. Advocates.

eral permitting minimizes both the burden on the agency and on sources.

In short, permitting of direct discharges from logging roads is compelled by the CWA, is necessary to achieve the goals of the Act, and—thanks to general permitting—places no unacceptable burdens on EPA or sources. The judgment below should be affirmed.

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Nos. 11-338 and 11-347

In the Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over three million business, trade, and professional organizations of every size, in every sector, and from every region of the country. Over 96% of the Chamber's members are small businesses with 100 or fewer employees. One of the Chamber's primary functions is to represent the interests of its members by filing *amicus* briefs in cases implicating issues of vital concern to American business.

This case presents an important question regarding the jurisdiction of federal courts under the Clean Water Act ("CWA") and other statutes enforced by citizen suit provisions: whether a court hearing a "citizen suit" brought pursuant to the CWA can invalidate an Environmental Protection Agency ("EPA") regulation in the guise of interpreting it. The rule-of-law principles at stake in answering that question are of central importance to the Chamber's members, especially given the frequency with which citizen suit provisions appear in the United States Code. Countless companies have structured important elements of their businesses around the plain text of EPA's Silvicultural Rule (40 C.F.R.

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *Amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *Amicus*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

§ 122.27(b)(1)), or other, similar agency rules enforced by citizen suit provisions. The profound implications for Chamber members of any decision upending settled regulatory expectations underscore the Chamber's strong interest in ensuring that the Ninth Circuit's decision is carefully examined and appropriately corrected.

SUMMARY OF ARGUMENT

Federal courts are courts of limited jurisdiction. Where Congress has set the bounds of a federal court's power, Article III demands that those bounds be respected. In resolving the case below, however, the Ninth Circuit violated that elementary principle of law by invalidating the EPA's longstanding Silvicultural Rule in the context of adjudicating this citizen suit. Because courts sitting to hear citizen suits enjoy jurisdiction only to *enforce* EPA's rules, not to *invalidate* them, the decision below must be vacated, and the case remanded with instructions to dismiss for lack of subject matter jurisdiction.

Congress enacted two distinct jurisdictional provisions for suits involving EPA's rules implementing the National Pollutant Discharge Elimination System's permitting program. One of the provisions, 33 U.S.C. § 1369(b), gives federal appellate courts exclusive jurisdiction to review the lawfulness of EPA's NPDES rules. *See id.* §§ 1369(b)(1)(E)-(F). In these direct review actions, EPA is a respondent and review generally must be sought within 120 days of a rule's promulgation. *See id.* § 1369(b)(1)(G). By statute, Congress has decreed that review of an NPDES rule can *only* be sought under Section 1369(b)(1). Such a rule "shall not be

subject to judicial review in any civil ... proceeding for enforcement." *Id.* § 1369(b)(2).

The second jurisdictional provision, 33 U.S.C. § 1365(a), allows federal district courts to adjudicate citizen suits. Citizen suits are not subject to Section 1369(b)'s 120-day time limit, and EPA need not be a party to the litigation.

The reason for this marked contrast between Sections 1369(b) and 1365(a) is that the two provisions serve different functions. Section 1369(b) provides for review of the lawfulness of EPA's rules; Section 1365(a) serves to ensure the rules are properly enforced. Accordingly, as this Court unanimously acknowledged in the analogous Clean Air Act ("CAA") context, "an attack on the validity of the regulation ... [cannot] be raised in an enforcement proceeding." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 572 (2007).

Here, the Ninth Circuit ignored the line separating these two jurisdictional provisions. No party disputes that the Silvicultural Rule implements EPA's NPDES permitting program. That means that under Section 1369(b)(1), the Silvicultural Rule itself may be reviewed only: (i) in a circuit court; (ii) in a case in which EPA is a respondent; and (iii) if review is timely sought. But not one of those conditions was met in this case. This suit was commenced in district court under Section 1365(a); the EPA was not made a party to the litigation; and this suit was filed decades after the Silvicultural Rule's adoption. The Ninth Circuit thus had jurisdiction only to ensure that the district court properly enforced the Silvicultural Rule—not to examine its lawfulness *vel non*.

Unfortunately, the Ninth Circuit did more than enforce the Silvicultural Rule; it invalidated it. Specifically, the Ninth Circuit held that "runoff from logging roads that [is] collected in a system of ditches, culverts, and channels" requires an NPDES permit. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1079-80 (9th Cir. 2011). The Rule, however, says the opposite—that "site preparation," "surface drainage," and "road construction and maintenance" are all activities that do *not* require a permit. 40 C.F.R. § 122.27(b)(1). Because the Silvicultural Rule is unambiguous, not even EPA has discretion to read it any other way.

The dispositive issue for this case thus does not involve the scope of EPA's authority but the entirely distinct question of the scope of the district court's jurisdiction to review—and potentially to invalidate—EPA regulations. The point here is that Congress withheld from the district courts any jurisdiction to review or revise the Silvicultural Rule when adjudicating citizen suits. The Ninth Circuit's decision to the contrary dispenses with the Clean Water Act's jurisdictional limitations; discards Congress's carefully drawn review regime; gives district courts review authority that they have heretofore lacked; and upsets the stability of comparable rules and review provisions. If allowed to stand, the Ninth Circuit decision would subject countless Chamber members and other regulated parties to new degrees of legal uncertainty across the entire swath of the Code of Federal Regulations provisions that are subject to enforcement via citizen suits. To restore certainty to the operation of the Clean Water Act and similar statutory regimes, the Ninth Circuit's decision should be vacated and the

case remanded with instructions to dismiss for want of subject matter jurisdiction.

ARGUMENT

The Ninth Circuit's "invalidation by interpretation" approach has serious consequences for the stability of settled regulatory understandings under the NPDES permitting regime and other regulatory regimes enforced by citizen suits. The Ninth Circuit's wholesale willingness to replace congressional limitations on when, where, and how regulations may be challenged with an uncertain regime in which courts may invalidate regulations long after their promulgation and through sleight of hand can only undermine the stability of the law. The Chamber's members have strong interests in ensuring that all regulated parties play on an even field defined by settled rules of the road for seeking judicial review of agency enactments. Only through adherence to such settled rules will judicial review determinations be orderly, predictable, and capable of allowing businesses to responsibly plan their affairs.

The decision below deprives regulated parties throughout the Ninth Circuit of these most basic and essential rule-of-law benefits. The Silvicultural Rule is unambiguous: no NPDES permit is required for ditches and culverts that drain water off the surface of logging roads. Nonetheless, the Ninth Circuit declined to give the Rule the only reading its text reasonably permits. The Ninth Circuit's decision thus discarded core limitations on review of agency action and deprived Chamber members of the benefits of the previously settled understanding of the Silvicultural Rule and other similar rules.

I. COURTS ADJUDICATING CITIZEN SUITS UNDER THE CLEAN WATER ACT LACK JURISDICTION TO INVALIDATE AGENCY RULES.

Congress has limited how, when, and where review of EPA rules implementing the NPDES permitting program can be obtained.

Under the CWA, review of an NPDES rule can be had "in the Circuit Court of Appeals of the United States for the Federal judicial district in which [the applicant] resides or transacts business," and "within 120 days ... or after such date only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1); *see also NRDC v. EPA*, 571 F.3d 1245, 1269 (D.C. Cir. 2009) ("[Under the CAA, t]he triggering date was July 2, 1979, when the EPA .... unequivocally asserted its authority to exempt new sources from permitting requirements under section VI. Thus, the petitioners' challenge to such authority in this case comes almost thirty years late and we are precluded from considering it.").

Congress left no doubt that judicial review of EPA rulemakings under Section 1369(b) is exclusive: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2); *see also Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981) ("Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for

enforcement.") (citing 33 U.S.C. § 1369(b)(2)); *Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989) ("Because the [CWA] bars review in enforcement proceedings of actions that could have been reviewed earlier, 33 U.S.C. § 1369(b)(2), careful lawyers must apply for judicial review of anything remotely resembling a reviewable order."). As a result, subject to due process limitations, "any agency action that was reviewable in the courts of appeals *cannot be challenged in an enforcement proceeding*, whether or not review was actually sought." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 605 (1980) (emphasis added).

Relatedly, federal district courts' jurisdiction to entertain citizen suits is also carefully circumscribed by statute. Section 1365(a) of the Clean Water Act provides that district courts enjoy jurisdiction only "to enforce ... an effluent standard," not to adjudicate whether a standard is lawful. 33 U.S.C. § 1365(a); *see also Maier v. EPA*, 114 F.3d 1032, 1036-39 (10th Cir. 1997) (explaining that Section 1365(a) cannot be used to challenge a rule's validity).

As this Court has explained in a criminal prosecution under the CAA:

> The narrow inquiry to be addressed by the court ... is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the

> course of an administrative review proceeding.

Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978); *see also United States v. Ethyl Corp.*, 761 F.2d 1153, 1157 (5th Cir. 1985) (applying *Adamo Wrecking Co.* in the civil context).

Congress' decision to cabin the scope of citizen suits in the Clean Water Act and other statutes is understandable, both as a matter of prudence and as a matter of constitutional principle. As members of the Court have remarked, private enforcement of public law raises "[d]ifficult and fundamental questions ... in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992) (holding in a citizen suit case that Congress could not allow private prosecution of any and all violations of federal law because that would infringe on "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3"). If read too broadly, citizen suit provisions could enable every court of competent jurisdiction to dip its own interpretive oar into agencies' most important regulatory waters—thus undermining the uniformity, predictability and even legitimacy of the resulting administrative regimes.

In short, Congress clearly and wisely established Section 1369(b) as the exclusive vehicle for obtaining judicial review of EPA regulations, while establishing Section 1365(a) citizen suits as a vehicle

for enforcing—but not for reviewing—such regulations.

II. THE LINE BETWEEN "INVALIDATING" A RULE AND "INTERPRETING" IT MUST BE DILIGENTLY ENFORCED.

Against the backdrop of these different review provisions, the line between "invalidating" a rule and "enforcing" it must be diligently policed. Most importantly, the judicial inquiry into the distinction between a rule's enforcement and its invalidation must go beyond mere labels.

As the Court has recognized, provisions for funneling challenges to rulemakings quickly into court serve important functions. So long as they are interpreted consistent with due process, such provisions, including Section 1369(b)(2) of the CWA, properly ensure that regulations are "uniformly applied" and "quickly reviewed by a single court intimately familiar with administrative procedures." *Adamo Wrecking Co.*, 434 U.S. at 284.

Indeed, as the United States' briefing explained in *Duke Energy*, such provisions "avoid[] inconsistent results and forum shopping, provide[] speedy and authoritative review in a court of appeals with particular expertise in the relevant area, and ensure[] that regulated entities are treated consistently throughout the country, thus ensuring a level playing field for the regulated community." Brief for the United States as Respondent Supporting Petitioners, *Duke Energy*, 549 U.S. 561 (No. 05-848) (2006 WL 2066660) (July 21, 2006), at 18 (citing *Harrison*, 446 U.S. at 593; *NRDC v. EPA*, 512 F.2d 1351, 1356-57 (D.C. Cir. 1975); *Lubrizol Corp. v. Train*, 547 F.2d 310, 317 (6th Cir. 1976)).

Accordingly, any failure to police the line between "invalidation" and "interpretation" of a rule would unsettle doctrine far beyond the boundaries of this case—and create confusion in the application of timing, exclusive jurisdiction, and remedial rules in a variety of administrative law contexts.

In particular, failing to police this jurisdictional line would subject Chamber members to challenges to agency rulemakings and orders brought long after the end of the specified review period. Importantly, the Clean Water Act is by no means alone in establishing comparatively short deadlines for judicial review of agency rulemakings. *See, e.g.*, 47 U.S.C. § 402(b) (Federal Communications Commission: 30 days); 42 U.S.C. § 7607(b) (CAA: 60 days); 42 U.S.C. § 300j-7(a) (Safe Drinking Water Act: 45 days); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act: 90 days); 30 U.S.C. § 1276(a)(1) (Surface Mining Control and Reclamation Act: 60 days); 28 U.S.C. §§ 2342, 2344 (numerous agencies including Atomic Energy Commission, Surface Transportation Board, and Federal Maritime Commission: 60 days).

Like statutes of limitations, such judicial review deadlines often serve to bar litigation of the merits of otherwise valid legal challenges. *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 125 (1979) ("It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose ...."). The larger point, however, is that Congress weighed the costs and benefits of time-barring otherwise meritorious claims against the costs and benefits of creating stability and certainly in a

particular regulatory regime. *Cf., Adamo Wrecking Co.*, 434 U.S. at 284 (explaining that Congress intended rulemakings in the environmental context to be "quickly reviewed by a single court intimately familiar with administrative procedures"). The balance struck by Congress in these provisions creates clear, well-defined avenues for bringing challenges to regulations, while permitting regulated parties to know the rules and plan their businesses accordingly.

Citizen suit provisions, by very nature, divide the authority to promulgate rules from the authority to enforce them in ways that threaten to undermine statutorily specified judicial-review windows. Outside the citizen suit context, the promulgator and enforcer of agency regulations is typically one and the same entity—the agency itself. In those circumstances, if an agency comes to question the wisdom of its own regulations, all it need do is take proper steps to amend them. Under citizen suit provisions, by contrast, private citizens, as agency outsiders, are authorized to enforce but not to amend agency regulations. This partial authority often leads to situations where these outside enforcers find they may enforce but may not challenge regulations with which they fundamentally disagree.

The bottom line is that, under any regime like the Clean Water Act, the coupling of a short window for review with a perpetual opportunity for private enforcement sorely tempts citizen litigants to dress up time-barred challenges to the validity of regulations as permissible actions seeking to enforce them. These incentives to engage in a sleight of hand (which, as explained below, are nicely

exemplified by the proceedings in this case) are precisely why a too-expansive compass for citizen suits undermines statutory review deadlines, unsettles the law, and upsets the well founded expectations of the business community.

In addition to specifying short time windows for challenging agency rulemakings, Congress also often provides that review of rulemakings occurs exclusively in particular courts, such as the courts of appeal. *See, e.g.*, 28 U.S.C. § 2343 ("The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.") (applying to review of orders of agencies listed in 28 U.S.C. § 2342). Because of the "institutional differences between trial and appellate courts," Congress's express statement "as to the particular type of court it wants to review agency action, ... should not be set aside lightly." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) ("Appellate courts develop an expertise concerning the agencies assigned them for review. Exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise. In addition, exclusive jurisdiction eliminates duplicative and potentially conflicting review, and the delay and expense incidental thereto.") (citation omitted).

Citizen suits by contrast are brought almost uniformly in the district courts. *See Laidlaw*, 528 U.S. at 173; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88 (1998). Allowing parties to challenge

the NPDES regulations and similar agency rules through citizen suits would mean that district courts, not appellate courts, would evaluate the lawfulness of such rules in the first instance—contrary to Congress's entrustment of such review to the courts of appeal. *See, e.g.*, 33 U.S.C. §§ 1369(b)(1)-(b)(2). In view of the heavy reliance of regulated parties on the special review competence of appellate courts, there is no reason to think that Congress intended to permit forum substitutions in cases involving challenges to agency rulemakings under the Clean Water Act and other statutory regimes that involve regulatory enforcement through citizen suits.

Finally, in ordinary administrative law cases, if a court invalidates a rule, it typically vacates the rule and remands to the agency for further proceedings. *See, e.g., Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) ("[W]e have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its conclusion."); *see also id.* at 10 (Randolph, J., concurring) (arguing that "whenever a reviewing court finds an administrative rule or order unlawful, the Administrative Procedure Act requires the court to vacate the agency's action"). Under this common procedure, regulated parties like Chamber members receive an opportunity to submit a new round of comments in connection with the agency remand and obtain the benefit of orderly, transparent agency decisionmaking in the wake of the instigating judicial review decision.

By contrast, invalidation-by-interpretation review acts to short-circuit and muddy up the typical agency remand process. In response to such an invalidation,

an agency may well choose to retain the federal court's rewriting of the regulation or to reject it—at least outside the circuit in which the review decision was issued. Such an outcome would greatly prejudice regulated parties by undermining the regularity of administrative practice, the uniformity of agency regulations, and the statutory review scheme enacted by Congress.

III. THE NINTH CIRCUIT EXCEEDED ITS JURISDICTION BY INVALIDATING THE SILVICULTURAL RULE IN THIS CITIZEN SUIT.

Here, the Ninth Circuit claimed only to enforce EPA's regulation and not to invalidate it. But a simple examination of the Rule, perusal of the Ninth Circuit opinion, and comparison between the Rule's operation before and after the Ninth Circuit's review decision shows without doubt that the Rule has been nullified.

A. The Silvicultural Rule Unambiguously Exempts Logging Ditches And Culverts From NPDES Permitting Requirements.

The Silvicultural Rule distinguishes between "[s]ilvicultural point sources," which are "subject to the NPDES permit program," 40 C.F.R. § 122.27(a), and "non-point source silvicultural activities," which do not require an NPDES permit, *id.* § 122.27(b)(1).

Specifically, the rule provides in relevant part:

> **(a) Permit requirement.** Silvicultural point sources, as defined in this section, are point sources subject to the NPDES permit program.

> **(b) Definitions.** (1) Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities *such as* nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.

Id. §§ 122.27(a)-(b)(1) (emphasis added).

In three ways, the Rule establishes that ditches and culverts draining water from logging roads "operated in connection with silvicultural activities" do not qualify as point sources and are hence exempt from NPDES permitting requirements.

First, the Rule expressly defines the scope of a "silvicultural point source" in a manner that does not include drainage ditches and culverts for roads. Under the Rule, a "discernible, confined and discrete conveyance[]"—such as a ditch or culvert—is a "silvicultural point source" subject to a permit requirement *only* if it is "related to rock crushing, gravel washing, log sorting, or log storage facilities." By implication, conveyances *not* "related to rock crushing, gravel washing, log sorting, or log storage facilities" are *not* "point sources subject to the

NPDES permit program." *See, e.g.*, *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the *expressio unius* canon). The Rule thus expressly defines the scope of silvicultural point sources in a way that excludes ditches and culverts made for logging roads.

Second, ditches and culverts for logging roads fall within the scope of the Rule's express NPDES permit exemption for certain categories of conduct dubbed "non-point source silvicultural activities." These exempted activities include, *inter alia*, "site preparation, ... surface drainage, [and] road construction and maintenance from which there is natural runoff."

Given the reality of silvicultural operations, the codified exemptions for "site preparation," "surface drainage," and "road construction and maintenance from which there is natural runoff" necessarily exempt from NPDES permitting all water management activities associated with rainwater runoff from logging roads—such as the use of ditches, culverts, and the like. Since at least the time of the Romans, road builders have recognized that well-functioning roads require that rainwater be drained away from road surfaces and into drainage ditches. *See, e.g.*, R. STACCIOLI, THE ROADS OF THE ROMANS 108 (2003) ("[T]he top surface of the roadway was normally curved or slightly pitched to allow rainwater to flow toward the drainage ditches on the sides and to prevent it from stagnating."). This drainage requires channeling rainwater away from roads and nearby areas. Hence, under most topographical conditions, it is practically impossible

to build well-constructed logging roads without also building accompanying ditches and culverts.

Accordingly, part of properly constructing and maintaining logging roads is properly constructing and maintaining ditches and culverts to ensure that the roads' inevitable periodic inundation does not cause a wash out—a fact that the United States itself recognized before the District Court in this litigation. *See* U.S. *Amicus* Brief, *Nw. Envtl. Def. Ctr. v. Brown*, No. 3:06 CV-01270, at 16-17 (D. Or. filed Dec. 6, 2006) ["U.S. D.Ct. Br."] ("NECD's interpretation of section 122.27 ignores the plain language of the regulation. The regulation refers to 'road construction and maintenance.' It is practically impossible to construct and maintain a road without including systems for the control of precipitation through ditches, culverts and the like. Otherwise, the roads would wash out. These structures are an integral part of forest roads and reading them as outside the scope of the regulation does not make sense because it defeats the plain language of the regulation.").

Simply put, if building logging-road ditches always required NPDES permits, then building logging roads themselves would practically always require such permits, because the latter can almost never be properly constructed without the former. Under that assumption, the Silvicultural Rule's express exemption for logging road "construction and maintenance" would be rendered largely meaningless. *See* U.S. D.Ct. *Amicus* Br. at 16 (accepting NEDC's "interpretation would render the second sentence of the rule superfluous"). That surely is no way to read a regulation. *See, e.g.*, *Nat'l*

Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007) (rejecting "reading [that] would render the regulation entirely superfluous").

Third, even assuming that the Silvicultural Rule's references to "site preparation," "surface drainage," and "road construction and maintenance" were not sufficient, of themselves, to capture logging-road ditches, the Rule's listing of exempted activities is notably non-exhaustive. The Silvicultural Rule expressly provides that other activities "such as" the listed activities are exempted from NPDES permitting requirements. Indeed, the use of a phrase like "such as" to introduce the non-exclusive list of non-point sources is particularly notable in light of the use of an exclusive list to define "silvicultural point sources." Given that ditches and culverts are part and parcel of preparing sites, draining surfaces, and constructing and maintaining roads, drainage from these structures must also be included within the category of "non-point source silvicultural activities." Having adopted a non-exhaustive list of exempted activities, EPA may not give the Silvicultural Rule so narrow a reading that the rule no longer accomplishes its evident purposes.

The upshot is that, even leaving aside the fact that EPA has always said that the Silvicultural Rule exempts ditches that direct runoff away from logging roads—thus precluding EPA from claiming deference for an interpretive reversal at this late date—the Rule itself leaves no doubt as to its meaning.

B. EPA Cannot Read The Silvicultural Rule To Mean Something Other Than What Its Plain Text Says.

Given the foregoing, it is apparent that even EPA has no discretion to read the Silvicultural Rule as the Ninth Circuit did. *See, e.g.*, *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous.") (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Here, as in *Christensen*, to "defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." 529 U.S. at 588.

Nonetheless, at the petition stage, the United States refused to acknowledge that the Silvicultural Rule always unambiguously exempted logging-road ditches and culverts. Instead, the United States argued that the Silvicultural Rule *is* ambiguous, but that EPA's position as articulated in its *amicus* brief is entitled to deference as to the Rule's interpretation. *See* CVSG Brief at 12. While the United States ultimately reaches the correct outcome—that the Ninth Circuit erred—its analysis is plainly wrong. Contrary to the United States' current position, the Silvicultural Rule contains no ambiguity.

The United States' characterization of the Silvicultural Rule as ambiguous deserves no deference. At the outset, the question whether a statute or regulation is ambiguous is for this Court to decide. "An agency is given no deference at all on the question whether a statute is ambiguous ...." *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (Silberman, J., joined by

Ginsburg, R.B., J., and Thomas, J.); *see also Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008) (same); *Wells Fargo Bank, N.A. v. FDIC*, 310 F.3d 202, 205-06 (D.C. Cir. 2002) (same); *see generally Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("If, however, *the court determines* Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute ....") (emphasis added).

No less importantly, the United States' shifting positions in this litigation undermine any agency deference that the EPA might otherwise be entitled to claim. *See Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2167-68 (2012) (refusing to defer to an interpretation that upended a "longstanding practice"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (1987) (refusing to defer to an interpretation due to "the inconsistency of the positions the [agency] has taken").

Before the district court, EPA argued, in addition to a call for deference, that the Silvicultural Rule's "language" is "plain" and that the "validity" of the rule could not be litigated in a "citizen suit." U.S. D.Ct. Br. at 10; *see also id.* at 16-17 ("[R]eading [ditches, culverts and the like] as outside the scope of the regulation does not make sense because it defeats the plain language of the regulation."). In the Ninth Circuit, the United States initially took the same position: the Silvicultural Rule exempts logging-road ditches from NPDES permitting requirements; any challenge to the Rule is jurisdictionally barred; and, in any event, the EPA is entitled to deference. *See* JA Vol. I at 27 ("This rule

categorically defines stormwater runoff from forest roads and harvesting activities as nonpoint sources."); JA Vol. I at 28 ("NEDC, having not challenged the silvicultural rule within the time frame provided by the statute, cannot now challenge the rule some thirty years later.") (discussing 33 U.S.C. § 1369(b)); JA Vol. I at 29 ("Should this Court nevertheless consider NEDC's improper and untimely challenge, this Court should defer to EPA's reasonable interpretation of the CWA to not require regulation of stormwater runoff from forest roads as point sources.").

Only in its 2011 Ninth Circuit brief in response to the panel's questions did the government perform its pirouette. In that brief, not only did the United States newly seek to concede all jurisdictional objections, it also dropped any argument that the Silvicultural Rule's text is plain. Instead, the government solely argued that the rule is ambiguous but that the Ninth Circuit should have deferred to the EPA's interpretation of it. *See* JA Vol. I at 53 ("Where EPA promulgates an ambiguous regulation and (as here) subsequently offers an interpretation of that regulation in an *amicus* brief, that interpretation is entitled to a high level of deference under *Auer* ...."). The government repeated this newly minted position in its *certiorari* briefing. *See, e.g.*, CVSG Br. at 12.

This Court has recognized that agencies face perverse incentives propelling them toward crafting ambiguous rules when they are asked—as they are every day—to implement statutes through regulations. *See Smithkline Beecham*, 132 S. Ct. at 2168 ("Our practice of deferring to an agency's

interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'") (quoting *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)).

This case illustrates a related danger. Even where a regulation itself is not ambiguous, an agency might well strain to manufacture a false, *post hoc* ambiguity and thereby create administrative flexibility that allows the agency to dispense with notice and comment before effecting regulatory changes. We see here just such a tidy morality play. In the proceedings below, the EPA first nobly resisted and then meanly succumbed to the omnipresent temptation to claim regulatory ambiguity and the additional degrees of interpretive freedom that accompany it. The Court should see the agency's course of action for what it is—and respond by ensuring that such efforts to manufacture artificial ambiguity are not rewarded.

C. The Ninth Circuit's "Interpretation" Of The Silvicultural Rule In Fact Invalidates The Rule.

As this Court unanimously recognized in *Duke Energy*, a party cannot "attack ... the validity of [a] regulation ... in an enforcement proceeding." 549 U.S. at 572. *Duke Energy* remanded the Fourth Circuit decision then under consideration, because that decision could "only be seen as an implicit declaration that the PSD regulations were invalid as

written." *Id.* at 573. While "no precise line runs between a purposeful but permissible reading of the regulation adopted to bring it into harmony with the [enforcing court's] view of the statute, and a determination that the regulation as written is invalid," there are cases, such as *Duke Energy*, where the only way to describe what the court has done is invalidation. *Id.*

A careful review of the Ninth Circuit's opinion below confirms that here, as in *Duke Energy*, the Court of Appeals outright invalidated the agency rule at issue. To be sure, the Ninth Circuit attempted to walk an interpretive tightrope by drawing a fine distinction between direct runoff from logging roads—which concededly does not constitute a point source—and logging-road runoff "channeled and controlled through a 'discernible, confined and discrete conveyance' in a system of ditches, culverts, and channels." *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1079. According to the Ninth Circuit, "challenged and controlled" runoff, in contrast to direct runoff, does constitute a point source. *See id.* But this proffered distinction, aside from its novelty, runs headlong into the Silvicultural Rule's text. It results in a rule that means something fundamentally different from what the Rule plainly says.

The ultimate, and acknowledged, rationale for the Ninth Circuit's reading of the Rule was the court's belief that the Clean Water Act mandates the tenuous distinction it found itself attempting to draw. To its credit, the Ninth Circuit forthrightly acknowledged that its "interpretation" of the Rule "does not reflect the intent of EPA." The Ninth Circuit nonetheless adopted this "interpretation" out

of a belief that EPA's regulation, as written, was an invalid application of the statute. *See, e.g., id.* at 1080 ("[T]here are two possible readings of the Silvicultural Rule. The first reading reflects the intent of EPA in adopting the Rule. Under this reading, the Rule exempts all natural runoff from silvicultural activities ... irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into protected water. If the Rule is read in this fashion, it is inconsistent with § 502(14) *and is, to that extent, invalid.* The second reading *does not reflect the intent of EPA*, but would allow us to construe the Rule to be consistent with the statute.") (emphasis added).

Remarkably, the Ninth Circuit also acknowledged that its judgment would require the EPA—not even a direct party to the case—to act affirmatively to create a new NPDES "permitting process" for silvicultural activities. According to the Ninth Circuit:

> Until now, EPA has acted on the assumption that NPDES permits are not required for discharges of pollutants from ditches, culverts, and channels that collect stormwater runoff from logging roads. EPA has therefore not had occasion to establish a permitting process for such discharges. But we are confident, given the closely analogous NPDES permitting process for stormwater runoff from other kinds of roads, that EPA will be able to do so effectively and relatively expeditiously.

Id. at 1087.

While becoming in its own way, the Ninth Circuit's candor is fatal to the viability of its decision. A decision premised on the rejection of "the intent of EPA" and requiring the creation of a brand new EPA "permitting process" can hardly be said to be enforcing—as opposed to invalidating—a preexisting EPA regime that lacks such a process.

There is at the end of the day no way to read the Ninth Circuit's decision other than as invalidating the Silvicultural Rule. The judgment below is therefore *ultra vires* and should be vacated. *See Duke Energy*, 549 U.S. at 573; 33 U.S.C. §§ 1369(b)(1)-(b)(2).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be vacated and the case remanded with instructions to dismiss for want of subject matter jurisdiction.

Respectfully submitted,

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v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., *et al.*,

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On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Environmental Protection Information Center, The Sierra Club, Waterkeeper Alliance, Rogue Riverkeeper, Puget Soundkeeper Alliance, Wildlands CPR, and Alliance For The Wild Rockies (collectively "EPIC *Amici*" or "*Amici*") submit this brief in support of Respondent Northwest Environmental Defense Center, urging the Court to affirm the decision below.[1] *Amici* are non-profit public interest organizations working to protect the environment, public health, and rural communities that rely on healthy rivers, streams, and estuaries. *Amici* have decades of experience and expertise participating in permitting, regulatory, and enforcement proceedings under the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 *et seq*.

In particular, *Amici* have provided technical and legal expertise in numerous proceedings addressing water pollution problems caused by industrial logging operations in rivers, lakes and streams throughout the United States and the ongoing failure of State-level forestry programs to have prevented, by themselves, the degradation in water quality of

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this *Amicus Curiae* brief by filing blanket consents with the Court. Pursuant to Supreme Court Rule 37.6, counsel for *Amici* certifies that no counsel for a party authored this brief in whole or in part and that no party, person, or entity other than *Amici* and counsel made a monetary contribution specifically for the preparation or submission of this brief.

thousands of miles of rivers, streams and lakes. *Amici* have been intimately involved in the development, implementation, and enforcement of numerous general permits issued pursuant to the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") to address discharges of storm water from a multitude of municipal and industrial settings. All of these organizations together have hundreds of thousands of members and supporters who rely on waters flowing through areas of industrial logging for recreation, scientific study, and protection of their health, safety, property, drinking water and food supply.

Amicus Environmental Protection Information Center and its approximately 3,000 members are located in Northern California where the Eel River, Elk River, Freshwater Creek, Klamath River, Wooley Creek, Albion River, Big River, Gualala River, Navarro River, Pudding Creek, Ten Mile River, Redwood Creek, and Trinity River are all identified pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), by the State of California and the United States Environmental Protection Agency as failing to achieve beneficial uses and water quality standards specifically because of sediment discharges from logging roads in those watersheds. California State Water Resources Control Board, California 2010 303(d) Combined List Table, "303(d) list – Excel file (includes potential sources)," http://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2010.shtml. EPIC filed an *Amicus Curiae* brief with the Ninth Circuit in this action and was involved for many

years in litigation raising the same issues before the Northern District Court of California. *Environmental Protection Information Center v. Pacific Lumber Co.*, 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003).[2]

Amicus The Sierra Club, founded in 1892, is the nation's oldest and largest grassroots environmental organization, with approximately 740,000 members nationwide. The Sierra Club has decades of experience addressing water pollution issues under both the Clean Water Act and State and Federal forestry and land management statutes.

Amici Waterkeeper Alliance, Rogue Riverkeeper, and Puget Soundkeeper Alliance are Waterkeeper organizations dedicated exclusively to water quality protection through education, scientific research and monitoring, advocacy, and enforcement. Waterkeeper Alliance is an international, non-profit organization based in the State of New York and serves as an umbrella organization comprised of nearly 200 member Waterkeeper programs in the United States and around the globe. Rogue Riverkeeper and Puget Soundkeeper Alliance are based in Ashland, Oregon and

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[2] *See also Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F.Supp.2d 803 (N.D. Cal. 2007); *Environmental Protection Information Center v. Pacific Lumber Co.*, 430 F.Supp.2d 996 (N.D. Cal. 2006); *Environmental Protection Information Center v. Pacific Lumber Co.*, 2004 WL 838160 (N.D. Cal. Apr. 19, 2004); *Environmental Protection Information Center v. Pacific Lumber Co.*, 302 F.Supp.2d 1102 (N.D. Cal. 2004); *Environmental Protection Information Center v. Pacific Lumber Co.*, 266 F.Supp.2d 1101 (N.D. Cal. 2003).

Seattle, Washington, respectively. These organizations' concentrated focus on the Clean Water Act and other water quality protection laws provides an informed and unique perspective on the issues before the Court.

Amicus Wildlands CPR is a non-profit environmental organization based in Missoula, Montana, with offices in Portland and Eugene, Oregon. Wildlands CPR works nationally with citizens, grassroots groups, tribes, and land managers to protect and restore natural areas, with a focus on rectifying the impacts from logging and other wildland roads to watersheds, terrestrial and aquatic species habitat, and municipal water supplies. Since 1994, Wildlands CPR has conducted scientific field studies documenting the aquatic and terrestrial impacts of roads resulting in numerous publications in peer-reviewed journals; conducted on-the-ground workshops attended by over 300 public land managers regarding the impacts of roads to aquatic systems; partnered with Tribes and universities to document the impacts of roads on wildlife and aquatic habitat and how to mitigate or restore the affected areas; and worked specifically with the Forest Service to improve their management of forest roads to reduce aquatic and terrestrial impacts. Wildlands CPR promotes the restoration of watersheds and rural economies through full maintenance of necessary roads and reclamation of ecologically damaging, unneeded roads – important sources of high-wage, high-skill jobs to people in rural communities.

Amicus Alliance For The Wild Rockies is a non-profit organization based in Helena, Montana, whose mission is to secure the ecological integrity of the Wild Rockies Bioregion through citizen empowerment, and the application of conservation biology, sustainable economic models and environmental law. Alliance For The Wild Rockies is frequently involved in water pollution issues related to logging roads.

The questions presented in this case have a critical and direct impact on whether the logging industry will be required to comply with the Clean Water Act's NPDES permitting requirement just like thousands of other industries, mom-and-pop businesses, state highway systems, and municipalities already are required to do. As organizations involved in environmental advocacy pursuant to the Clean Water Act as well as State and federal forestry laws, *Amici* have a unique perspective and interest in the outcome of this case.

STATUTORY BACKGROUND

"Beginning with the Congressional intent to eliminate pollution from the nation's waters by 1985, the [Clean Water Act] was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). *See* 33 U.S.C. § 1251(a)(1). In furtherance of that goal, "[t]he Act established a comprehensive

scheme for federal regulation of water pollution, the National Pollut[ant] Discharge Elimination System [NPDES], as a means of achieving and enforcing effluent limitations." *Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984).

The Act prohibits the discharge of any pollutants from any point sources, unless one or more carefully enumerated exceptions apply. 33 U.S.C. § 1311(a). One exception is a discharge authorized by an NPDES permit pursuant to section 402 of the Act. *Id.*; 33 U.S.C. §§ 1342(a); 1342(p)(2)(B). "The term 'discharge of pollutants' means (A) any addition of any pollutant to navigable waters from any point source. . . ." 33 U.S.C. § 1362(12). Such discharges include "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man. . . ." 40 C.F.R. § 122.2. "Point source" is defined broadly by Congress as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

"Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Only where there is no discernable conveyance of polluted effluent, *i.e.*, no "point source," is a discharger relieved of having to obtain an NPDES

permit. The only exceptions to the NPDES permitting mandate have been expressly provided by Congress within the Act. *See, e.g.*, 33 U.S.C. § 1362(6) (certain vessel discharges); § 1342(l)(1) (agricultural return flows); § 1362(14) (same); § 1342(l)(2) (uncontaminated stormwater discharges at mine sites).

The NPDES permitting program is, in large part, managed by the individual States, with EPA playing an ancillary oversight role. The CWA requires EPA to delegate NPDES permit issuing authority to individual states upon the state meeting certain criteria. 33 U.S.C. § 1342(b)-(c). It was Congress' clear intention that the States "assume the major role in the operation of the NPDES program." *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978). Indeed, that Congressional intent has been realized. 46 of the 50 States have been delegated authority to issue NPDES permits for their respective waters, EPA retaining only a limited authority to review and potentially (though in practice rarely) vetoing deficient permits. Environmental Protection Agency, State Program Status, http://cfpub1.epa.gov/npdes/statestats.cfm?program_id=12; 33 U.S.C. § 1342(c) (upon approval of a State's NPDES program, EPA must suspend its own issuance of permits within that State).

NPDES permits may be issued as either general permits or individual permits. 40 C.F.R. §§ 122.28, 122.21. General permits cover a large number of dischargers within specified categories. For example, 46 States have issued their own state-wide general permits for certain categories of discharges of storm

water associated with industrial activity. EPA has issued a nation-wide general permit for such discharges as well, covering the four States that have not opted to manage the NPDES program in their jurisdictions, Tribal lands, United States territories and some federal facilities. Where a general NPDES permit applies to a discharge, rather than apply for an individual permit and go through a detailed hearing process, an individual discharger need only file a "Notice of Intent" to operate under the existing general permit and proceed to comply with its terms. *See* 40 C.F.R. § 122.28(b)(2).

SUMMARY OF ARGUMENT

The EPIC *Amici* focus this brief *Amicus Curiae* on exposing many of Petitioners' *Amici*'s wholesale exaggeration of the infeasibility and difficulty of applying an NPDES permit to logging road discharges. A number of Petitioners' *Amici* argue that polluted storm water being discharged from logging roads is so distinct from storm water falling on other industrial operations and municipalities that it is impractical to regulate that pollution discharge through the CWA's NPDES permitting program. Other Petitioners' *Amici* claim that the sheer number of logging road outfalls and operators makes it inconceivable that EPA and the States could issue the NPDES permits anytime in the foreseeable future. However, much more complicated facilities than logging roads – for example, entire cities and counties – have been effectively

regulated with NPDES permits issued on a state or nation-wide basis. Indeed, applicable NPDES general permits for storm water associated with industrial activity already exist and can be used immediately to address logging road discharges.

ARGUMENT

I. This Case Is Limited To Industrial Logging Roads And Does Not Involve Every Forest Landowner In The United States.

The Court of Appeals' ruling is limited to holding that storm water discharged from point sources on two logging roads used for industrial logging must be subject to an NPDES permit. Pet. App. at 6-7, 44-48. Reading many of the briefs *Amici Curiae* filed in support of Petitioners, one would think that the Court of Appeals' ruling held that NPDES permits were required for every person who cuts down a tree on their property or uses a road on federal land. *See, e.g.*, American Forest Resource Council *Amicus* Brief at 13 (suggesting ruling on industrial logging roads would affect Bureau of Land Management off-highway vehicle uses); *id.* at 16 (invoking ranching families and claimed effects on grazing allotments); Pacific Legal Foundation *Amicus* Brief at 10 (loosely describing the Court of Appeals' ruling as "[e]xtending the NPDES to cover forest road runoff"). These scenarios attempt to expand the Court of Appeals' ruling well beyond its specific facts. In so doing, Petitioners' *Amici*

fail to respect the limited scope of the Court of Appeals' ruling.

The logging roads at issue, although owned by the State of Oregon, are specifically designated as "timber hauling routes." Joint Appendix ("JA") at 7-8, 19-20 (NEDC's First Amended Complaint). The logging roads are maintained by four logging companies as a condition of their licenses to conduct industrial scale logging in the Tillamook State Forest. *Id.* at 19-20. The roads are "primarily used by the [timber companies] to gain access to logging sites and to haul timber out of the forest." Petition Appendix ("Pet. App.") at 45-46. The Court of Appeals emphasized the importance of the road's primary use to its ruling that the road's storm water discharges are associated with industrial activity:

> We recognize that logging roads are often used for recreation, but that is not their primary use. Logging companies build and maintain the roads and their drainage systems pursuant to contracts with the State. Logging is also the roads' *sine qua non:* If there were no logging, there would be no logging roads.

Id. There also is no dispute that the logging roads at issue are used by the logging companies to access their other log processing facilities. *Id.* And EPA's own regulations include logging operations as an industrial activity, identified by Standard Industrial Classification ("SIC") Code 2411. *Id.* at 44-45.

Because the discharges of pollutants alleged in NEDC's complaint plainly qualify as "discharges of stormwater associated with industrial activity," they require an NPDES permit. JA at 3, 14, 20-24, 31-35. *See* 33 U.S.C. § 1342(p)(2)(B); 40 C.F.R. § 122.26(a)(1)(ii) and (e)(1)(i). The Court of Appeals did not rule, as Petitioners' *Amici* suggest, that every road, or every non-commercial harvest of trees by a property owner, triggers an NPDES permitting process under Congress' industrial storm water provision. The dire consequences predicted by the various Petitioners' *Amici* are nothing more than red herrings attempting to divert the Court from the specific facts and limited scope of the Court of Appeals' ruling.

II. The CWA Does Not Require That An Individual Permit Be Issued For Every Point Source Or Every Landowner.

Petitioners' *Amici* briefs expend considerable effort inflating the number of NPDES permits that they predict will have to be processed and issued if the Court of Appeals' decision is upheld. Relying on their unsubstantiated, exaggerated numbers, Petitioners' *Amici* then predict chaos will ensue and EPA's and the State's NPDES-permitting programs will grind to a halt. *See, e.g.*, State of Arkansas *Amicus* Brief at 19; American Forest Research Council *Amicus* Brief at 10; Pacific Legal Foundation *Amicus* Brief at 13-15. None of the Petitioners' *Amici*'s self-serving exaggerations reflect the reality of the

NPDES permitting program's general permitting provisions or the existing NPDES general permits issued for every State and territory of the country that already are available for storm water discharges from industrial logging operations.

Both EPA and delegated States may issue general permits to regulate categories of dischargers. 40 C.F.R. § 122.28. EPA's regulations expressly authorize the use of general permits for "Storm water point sources." 40 C.F.R. § 122.28(a)(2)(i). Contrary to the *Amici* States' assertion, the general permit regulation does not require the States to first "conduct an inventory of the thousands, and in some instances millions, of miles of forest roads . . . " before a general permit can be issued. For "categories or subcategories of point sources *other than storm water point sources*[,]" Section 122.28(a)(2) does require EPA and States to find that the point source categories involve the same or similar operations, discharge the same types of waste, and require the same effluent limitations and monitoring. 40 C.F.R. § 122.28(a)(2)(i)(A)-(D). *Amici* States simply ignore that EPA authorizes general permits for storm water discharges without those findings.

III. Logging Road Dischargers Already Can Satisfy Their Duty To Obtain An NPDES Permit By Enrolling In Existing General Permits For Storm Water Associated With Industrial Activity.

General NPDES permits already have been issued and can be relied upon by any discharger of storm water associated with industrial activity anywhere in the United States or its territories. States and EPA were obligated to issue NPDES permits for industrial storm water discharges by not later than February 4, 1991. 33 U.S.C. § 1342(p)(4)(A).[3] Both EPA and the States have issued nation-wide (in the case of EPA) or state-wide general permits for industrial storm water discharges. Environmental Protection Agency, "Authorization Status for EPA's Stormwater Construction and Industrial Programs," http://cfpub.epa.gov/npdes/stormwater/authorizationstatus.cfm (last visited October 18, 2012). With the exception of Massachusetts, New Hampshire, New Mexico and Idaho, every other State already has issued a statewide general permit for industrial storm water discharges. *Id.* EPA's nation-wide permit covers those four States as well as remaining territories, a few federal facilities, and Indian Country. *Id.*

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[3] Congress provided an extension of time for certain municipalities discharging storm water associated with industrial activities. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, §1068, 105 Stat. 1914, 2007-2008 (1991).

Industrial logging road operators already could comply with these general permits to satisfy their permit obligation. For example, EPA's 2009 Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity ("MSGP"), originally issued in 1995, specifically identifies SIC Code 2411 as an industrial sector that is governed by the MSGP. Environmental Protection Agency, Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity (MSGP), § 8.A.6, App. D-2 (May 27, 2009), http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf. SIC Code 2411 defines "logging" as "establishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials . . . in the field." Pet. App. 45. To obtain NPDES permit coverage under the MSGP, an industrial logging road operator or owner must file a "notice of intent." MSGP, § 1.3.1. The permittee would have to implement best management practices ("BMPs"). *Id.*, § 2.1. The permittee would need to prepare a storm water pollution prevention plan describing the BMPs applicable to their logging roads. *Id.*, § 5. By design, the MSGP is imbued with flexibility to allow the variety of storm water discharges to adjust some of the requirements in order to accommodate the variety, type, and sizes of operations. For example, where a logging road has two or more outfalls that the discharger "believe[s] discharge substantially identical effluents," quarterly visual observations may be done on a rotating basis rather than for each outfall every quarter. *Id.*, § 4.2.1. Likewise, the number of outfalls from which storm water is to

be sampled also can be reduced based on the presence of substantially identical outfalls with similar exposed pollution sources, and similar control measures and runoff volumes. *Id.*, § 6.1.1. Nor are dischargers enrolled in the MSGP required to submit new applications every five years in order to maintain their coverage. *Id.*, § 1.3.2.

The many existing State industrial storm water permits are largely modeled on the MSGP, containing the same basic enrollment requirements and flexibility to manage the visual inspections and monitoring, especially for larger facilities. *See, e.g.*, California State Water Resources Control Board, NPDES Permit No. CAS000001, http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf; Texas Commission on Environmental Quality, General Permit to Discharge Under the Texas Pollutant Discharge Elimination System, General Permit No. TXR050000, http://www.tceq.texas.gov/assets/public/permitting/stormwater/txr050000.pdf; Oregon Department of Environmental Quality, General Permit NPDES Storm Water Discharge Permit, Permit No. 1200-Z, http://www.deq.state.or.us/wq/wqpermit/docs/general/npdes1200z/permit2012.pdf. These permits have been in place for 15 years or longer and are designed to accommodate thousands of permittees, and have done so without an undue burden on the overseeing state agencies or EPA.

As a result, and certainly in the near term, industrial logging road operators or owners can simply

plug in to the existing general NPDES permits which already cover their discharges. Contrary to Petitioners' *Amici*'s claims, no time is necessary for any State agencies or EPA to issue a new industrial storm water general permit to address industrial logging roads. The deluge of new permits, "chaos" and general assertions of infeasibility predicted by various Petitioners' *Amici* are not based on reasoned analysis of the existing regulations or permitting systems, but rather unconstrained advocacy positions.

IV. NPDES Permits Focus On The Precise Locations Where Logging Roads Discharge Pollutants To Waters And Will Encourage Logging Roads To Maximize The Use Of Non-Point Source BMPs That Eliminate Or Reduce Point Source Discharges.

A number of Petitioners' *Amici* claim that applying the NPDES permitting program to logging roads would undermine or unnecessarily replicate the BMP-based regulations currently relied upon by the States and federal agencies to maintain logging roads and address the roads' sediment and turbidity pollution. *See* State of Arkansas *Amici* Brief at 15-19. On the contrary, a general NPDES permit for logging road discharges compliments the non-point source BMP programs already in place by encouraging logging road operators to fully implement non-point source BMPs and limit the number of point sources discharging sediment from their roads. By taking measures to ensure as much as possible of their

logging road discharges filter into adjacent hillsides and lands and do not enter any stream or waterbody, operators would keep the vast majority of logging road discharges out of the NPDES permit's provisions. The NPDES permit for a logging road would directly ensure the proper implementation and monitoring of BMPs only on the logging roads' remaining **point source** discharges, *i.e.*, stream-crossing culverts and other discharges directly into streams and channels – the source of water pollution from logging roads.

NPDES permits for storm water discharges may, and do, rely upon BMPs as the basis for effluent limitations. 40 C.F.R. § 122.44(k) (NPDES permits shall include "Best management practices (BMPs) to control or abate the discharge of pollutants when: . . . (2) Authorized under section 402(p) of the CWA [33 U.S.C. § 1342(p)] for the control of storm water discharges"). *See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502 (2d Cir. 2005) ("site-specific BMPs are effluent limitations under the CWA"). Storm water discharges from unpaved logging roads are dominated by a single pollutant – sediment or turbidity. JA at 15. The BMPs addressing potential sediment and turbidity discharges from logging roads are relatively well-understood. *See, e.g.*, Texas Forest Service, Texas Forestry Best Management Practices (August 2004), http://txforestservice.tamu.edu/uploadedfiles/sustainable/bmp/bmpbookindd.pdf. *See also* JA at 78-84 (Oregon Department of Forestry, Forest Practices Technical Note No. 8, Version 1.0 (June 20, 2003)). Although

different BMPs would apply to different road-surfaces and locations, the suite of typical BMPs is the same. *See id.* Numerous BMP manuals have been published describing the typical BMPs applicable to unpaved logging roads. *See, e.g., id.* Such BMPs include, for example, properly spaced cross-drains, culverts, rolling dips, wing ditches, and water bars that channel storm water off of the road onto the adjacent slope or area in smaller volumes that seep into the adjacent soil without forming a gulley or erosion channel or discharging to waters. *See* Texas BMPs at 30-47; JA at 78-84. As a result, on a well-maintained logging road, the volume of polluted runoff discharged from point sources to a stream or creek should be limited to readily-identifiable and relatively small portions of the logging road. The levels of sediment and turbidity in the remaining storm water flows that are channeled to waters of the United States at stream crossings or adjacent waters would be controlled through the use of stone or aggregate on road surfaces, riprap, geotextile fabric, velocity reducers and other erosion control measures. Texas BMPs at 48-49.

Applying the NPDES permitting requirement to logging roads encourages logging operators to vigorously implement these runoff-reducing BMPs. On a properly maintained logging road, the vast majority of runoff locations should be dispersed via cross-drains onto the adjacent lands rather than into any gullies, creeks or streams. These areas would not be point sources, never discharging to any waters or their tributaries.

The NPDES permitting requirements would apply to make sure actual point source discharges were limited and properly controlled at stream crossings where the logging road passes over a water of the United States or its tributary, or other outfalls where logging roads are adjacent to stream channels. The NPDES Permit, because of its focus on point source discharges, would focus on the logging roads' key problem areas where sediment is conveyed to waterways. By layering in better information about these actual discharge locations, reasonable monitoring requirements, and assuring that those discharges comply with applicable water quality standards, the NPDES program would ensure that shortcomings in the existing forestry programs in Oregon and around the country would be addressed by the expert water quality agencies and meet the important water quality goals of the Clean Water Act. *See* Northwest Environmental Advocates *Amicus Curiae* Brief.

V. NPDES Permits Have Been Readily Developed For Much More Complicated Storm Water Discharges Than Those From Logging Roads.

Petitioners' *Amici* argue that attempting to develop NPDES permits for logging roads will overwhelm EPA and the various State permitting agencies. *See, e.g.*, Pacific Legal Foundation Brief at 15. This assertion overlooks the fact that logging road operators may enroll right now under existing NPDES general permits. *See, supra*, pp. 13-16. And even if the States

or EPA opted to prepare specific general permits for industrial logging roads, such permits would be much simpler than the many storm water permits already issued by the States and EPA.[4]

EPA and the States have issued NPDES permits that effectively regulate storm water discharges from cities, including their roads, from highway systems, and from a wide variety of "industrial" facilities. *See* 33 U.S.C. § 1342(p)(2)-(3). Discharges from a large city's storm water system are infinitely more varied in terms of types of pollutants, volumes of storm water, and variety of point sources than storm water discharges from logging roads. 55 Fed. Reg. 47990, 47991-92 (Nov. 16, 1990). Storm water discharges from highways and municipal roads also are generally larger and more varied than discharges from a logging road. *See, e.g.*, Michael E. Barber, et al., "Preliminary Environmental Investigation Of Heavy Metals In Highway Runoff," p. 1 (Nov. 21, 2006), http://www.wsdot.wa.gov/NR/rdonlyres/A3518878-820F-4EBD-9D47-C518AA2F8C91/0/PrelimEnvironmentalInvestigationHeavyMetals.pdf ("Federal Highway Administration (FHWA) identifies cadmium, chromium, copper, iron, lead, nickel, and zinc as the metals typically associated

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[4] *Amici* Pacific Legal Foundation's attempt to compare a general storm water permit to EPA's initial effort to craft a NPDES permit for ballast water discharges from ships is unhelpful. Pacific Legal Foundation *Amici* Br. at 16. Ballast water discharges are not storm water. Treating ballast from ships raises entirely unique technical questions unrelated to logging roads.

with highway runoff"). Industrial facilities spanning a large array of activities, including many that are not traditionally identified as "industrial" such as construction sites, landfills, and open dumps – each with its own assortment of pollutant sources, facilities and operations – discharge storm water with a large variety of pollutants from every conceivable form of outfall. *See* MSGP at 47-138.

The NPDES permitting system has proven itself adaptable to handle these sprawling water pollution challenges, allowing for effective regulation and oversight without undue burdens disproportionate to addressing the pollution discharges at issue. Storm water discharges from logging roads are relatively homogeneous when compared to these other storm water discharges regulated by NPDES permits under the CWA. There is no empirical evidence demonstrating that the NPDES permitting program cannot readily address the relatively simple category of logging road point source discharges.

NPDES permits have been issued that are effectively regulating storm water discharges from roads. For example, in 1992, pursuant to its delegated NPDES-permitting authority, the State of California issued and continues to maintain and update an NPDES permit that covers all point source discharges from the California Department of Transportation's highway system. California State Water Resources Control Board, NPDES Permit No. CAS000003, http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/caltrans/caltranspmt.pdf. The breadth of this

general NPDES permit and the variety of roadway point sources it addresses dwarfs the relatively repetitive discharge-types associated with unpaved logging roads. *See* Caltrans, Statewide Stormwater Management Plan (May 2003), http://www.dot.ca.gov/hq/env/stormwater/pdf/CTSW_RT_02_008.pdf. Other states also have issued NPDES permits for discharges from highways and roads. *See, e.g.*, New Jersey Dep't of Environmental Protection, Highway Agency Stormwater General Permit, NJPDES Permit No. NJ0141887, http://www.nj.gov/dep/dwq/pdf/existing_highway_permit_final_2_27_09.pdf; State of Washington, Department of Ecology, Washington State Department of Transportation NPDES and State Waste Discharge Permit for Municipal Stormwater, Permit No. WAR043000A, http://www.ecy.wa.gov/programs/wq/stormwater/municipal/wsdot/docs2011/wsdotpermit030712.pdf.

Similarly, throughout the country, EPA and the 46 delegated States have issued NPDES permits for large, medium, and small municipalities, including storm water discharges from each and every road included in those cities' and counties' jurisdiction. *See, e.g.*, California Regional Water Quality Control Board, Central Valley Region, NPDES No. CAS082597, Stormwater Discharges From Municipal Separate Storm Sewer System, Sacramento County (Sept. 11, 2008) ("Sacramento Municipal Permit"), http://www.waterboards.ca.gov/rwqcb5/board_decisions/adopted_orders/sacramento/r5-2008-0142.pdf. Again, the variety of discharges and outfall types addressed by these municipal permits is much more diverse than the discharges

and outfall types encountered on logging roads. Large and medium municipalities include, generally, urban areas with populations of 250,000 and 100,000 persons or greater, respectively. 40 C.F.R. § 122.26(b)(4) & (7). The larger municipality permits tend to be issued on a city- or county-wide basis. *See, e.g.*, Sacramento Municipal Permit. As for smaller municipalities, that term applies not only to smaller cities but also to other public entities, including sewage districts, flood control districts, and similar entities. 40 C.F.R. § 122.26(b)(16). These NPDES permits have been issued on a state-wide basis. *See* California State Water Resources Control Board, NPDES Permit No. CAS000004, http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/final_sm_ms4_fact_order.pdf. The small municipal permit requirements specifically cover "highways and other thoroughfares." 40 C.F.R. § 122.26(b)(16)(iii).

The "multi-sector" NPDES permits issued for the last twenty years to industrial storm water dischargers also are a testament to the ability of EPA and the States to issue a single permit covering entire States, or in the case of EPA, the remainder of the country and its territories, that effectively address unquantified numbers of point source discharges in every variety of climate and location and covering a diverse array of industry types and associated pollutants. *See, e.g.*, California State Water Resources Control Board, NPDES Permit No. CAS000001, http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf. Access roads are included.

Id., Attachment 4, p. 2. The range of the industrial storm water NPDES permits is much greater than that necessary to address the relatively simple category of storm water discharges from logging roads. Indeed, as discussed above, the existing industrial storm water NPDES permits already encompass or can be readily applied to storm water discharges from logging roads.

Lastly, industrial sectors involving large networks of paved and unpaved roads have been permitted through industrial storm water NPDES permits. Oil and gas fields which have experienced spills of oil or other hazardous materials in quantities reportable to EPA are subject to the industrial storm water NPDES permitting requirements. 40 C.F.R. § 122.26(c)(1)(iii); 60 Fed. Reg. 50913 (Sept. 29, 1995) ("[t]his includes storm water discharges from access roads. . . ."). For example, in California, several oil and gas fields operated within the State encompassing large geographic areas, are enrolled in the General Industrial Stormwater Permit. *See, e.g.*, Vintage Production California LLC, Notice of Intent to Comply With the Terms of the General Permit to Discharge Storm Water Associated With Industrial Activity (WDID 4-56I-020994) (July 2, 2007) (oil and gas field facility encompassing 4,236 acres), posted at https://smarts.waterboards.ca.gov/smarts/faces/PublicDataAccess/PublicNoiSearchResults.jsp; Ventura County, Resource Management Division, Rincon/Grubb Oil Fields, Aerial Photography Map (Dec. 21, 2011), http://www.edcnet.org/learn/current_cases/cwa/Rincon-Grubb_

OilFieldMap.pdf (showing extensive road network). It is no less feasible for industrial logging operations to enroll in a general permit for storm water discharges from their roads.

The authority and ability of EPA and the delegated States to issue NPDES permits addressing storm water discharges from roads in both municipal and industrial contexts addressing thousands of cities and tens of thousands of industrial facilities throughout the country directly refutes the dire and unsubstantiated predictions presented by various *Amici* in support of Petitioners. "Chaos" has not resulted from EPA's and the State's issuance of NPDES permits governing municipalities, transportation departments and industrial roads. Requiring industrial logging road operators or owners to access the existing general NPDES industrial storm water permits adopted by EPA and 46 States is not a significant burden for any discharger or regulatory agency.

CONCLUSION

The NPDES permitting program is one of the most successful and effective pollution control programs ever devised. *See, e.g.*, California Regional Water Quality Control Board, San Francisco Bay Region, "Wastewater," http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/wastewater.shtml ("The NPDES program is one of the most successful environmental

programs ever implemented"); Environmental Protection Agency, "National Pollutant Discharge Elimination System (NPDES)," http://cfpub.epa.gov/npdes/ ("Since its introduction in 1972, the NPDES permit program is responsible for significant improvements to our Nation's water quality"). The EPIC *Amici* respectfully request that the Supreme Court uphold the Ninth Circuit Court of Appeals' decision enforcing the Clean Water Act's clear requirement that operators of roads primarily involved in logging obtain and comply with NPDES permits applicable to their point source discharges.

Respectfully submitted,

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Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF INTEREST[1]

Amici curiae are professors of law who specialize in the areas of administrative law and environmental law. They have a strong interest in the proper understanding and application of this Court's various doctrines according judicial deference to the decisions and determinations of expert agencies such as the Environmental Protection Agency. In the view of *amici curiae*, those doctrines should and do require reversal of the Ninth Circuit's decision below.

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[1] Counsel for all parties consented to the filing of this brief. No counsel for a party in this case authored the brief in whole or in part, and nobody, other than *amici* or their counsel, has made a monetary contribution to its preparation or submission.

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SUMMARY OF ARGUMENT

I. Congress delegated administration of the Clean Water Act ("CWA") to the Environmental Protection Agency ("EPA")—not the Ninth Circuit. The EPA, for its part, made clear in regulations that timber companies need *not*, for two independent reasons, obtain discharge permits for natural runoff from forest roads. Over the course of nearly forty years, the agency has never departed from that view. But the court below, ignoring the EPA's expertise, held to the contrary. In light of the deference properly accorded to agency constructions of ambiguous statutes and regulations, that holding was error.

A. Soon after the CWA was enacted, the EPA reasonably determined that rainfall-induced runoff from forest roads does not require a CWA permit, as it is properly classified as a "nonpoint source" of pollution—whether it reaches navigable waters on its own, or is channeled there by ditches. After all, while the CWA's definition of "point source" is intentionally vague, it is clear that natural runoff, in the ordinary course, is a quintessential *nonpoint* source. And the characteristics that make it so—like the inability to trace its pollutants to a discrete, identifiable act or place—are equally present when the runoff reaches navigable waters through a drainage system. Yet the Ninth Circuit concluded that such indisputably "nonpoint source" runoff unambiguously transforms into a "point source" when channeled to navigable waters through a system of ditches and culverts, of the sort mandated by the State of Oregon to minimize the runoff's environmental impact.

B. After Congress exempted from the CWA's permit scheme all but five categories of stormwater

discharge, the EPA issued regulations explicating those categories. Under these rules, forest-road runoff is not "associated with industrial activity"—sensibly, given that forestry is hardly industrial; forest roads are used for many purposes; and the linkage between forest roads and logging is limited to the timber companies' use of the roads to drive to and from logging sites. Yet, again, the court below thought it knew better, ruling that the runoff *is* so associated.

II. Deference to agencies charged with administering statutory schemes has many benefits. Of course, at least in some cases, it also has costs, and so it behooves this Court to examine carefully the propriety of deference in each particular case. Here, though, such an examination reveals that there is *every reason* to defer to the EPA—and *no reason* to withhold that deference.

The values of fair notice and predictability may counsel against deference when an agency reverses its position without due warning or good cause. But the EPA's approach to forest-road runoff has been a model of consistency for nearly four decades, practically since the CWA was enacted. Similarly, the relative competences of agencies versus courts may suggest that judges take the lead on pure questions of statutory interpretation. But the legal standards here are not disputed; forest-road runoff presents a question of *application*, implicating the EPA's core domain of environmental policy. Finally, it may create perverse incentives for courts to blindly adopt an agency's *post hoc* construction of its own vague regulations. But here the EPA spoke precisely

and definitively to the proper application of the determinative statutory terms.

If the EPA is ever entitled to deference, it is here: in applying vague statutory definitions to a concrete scenario and thereby selecting a suitable method of regulation for a particular source of water pollution, clearly and consistently for over thirty-five years.

ARGUMENT

I. The Ninth Circuit Doubly Denied Deference to the EPA's Reasonable Classification of Forest-Road Runoff.

The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, designed to address the highly complex and multifaceted problem of water pollution in the United States, necessarily relies on various categorizations and classifications to break that larger problem into more manageable segments. Those segments, in turn, are addressed in different ways with due sensitivity to the nature of the problem, including its relative priority, and the feasibility of potential solutions. The EPA, of course, plays a leading role in administering the regime created by the CWA, including the rules and procedures that give it life.

This case turns on two questions of categorization under the CWA. *First*, when rain washes sediment from forest roads and surrounding lands into ditches and ultimately into rivers or lakes, is the resulting pollution the result of a "point source" discharge? *Second*, is this runoff "associated with industrial activity"? If the answer to *either* question is "no," then the timber companies who maintain these roads need not obtain permits under the CWA's National Pollutant Discharge Elimination System ("NPDES").

Such discharges would instead be regulated by the States, under other parts of the CWA and state law.

The EPA has answered "no" to *both* questions. In its view, natural runoff from forest roads is *neither* a "point source" of water pollution *nor* "associated with industrial activity." Therefore, it is doubly exempt from the NPDES scheme. Accordingly, rather than the EPA, States like Oregon have long regulated the roads at issue—including by mandating construction of the very drainage systems that gave rise to this litigation.

In the decision below, the Ninth Circuit ruled that the EPA was wrong on both questions. That is, for each agency answer of "no" to the determinative questions in this case, the court substituted a judicial "yes," holding that the EPA's determinations were at odds with both the CWA itself and the EPA's own implementing regulations. As to both questions, the Ninth Circuit failed to accord the deference that is due to an expert agency's reasonable interpretation of an ambiguous statute, *see Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), or regulation, *see Auer v. Robbins*, 519 U.S. 452, 461 (1997). Congress self-evidently could not enumerate, in the CWA, every source of water pollution and impose a specific rule for each. Rather, Congress relied on the EPA to take the lead in classifying the innumerable contexts in which pollutants contaminate navigable waters, ensuring that each is assigned to the proper category of the complex scheme that Congress designed. That is precisely what the EPA did here. It was error for the Ninth Circuit to second-guess the EPA's reasonable classifications.

A. The EPA reasonably categorized natural runoff from forest roads as a "nonpoint source" of water pollution.

1. One of the basic distinctions created by the CWA is that between "point" and "nonpoint" sources of pollution. While the Act flatly prohibits the "discharge of any pollutant" absent an NPDES permit (or other statutory exception), 33 U.S.C. § 1311(a), it defines "discharge of a pollutant" as the "addition of any pollutant to navigable waters *from any point source*," *id.* § 1362(12)(a) (emphasis added). The net result is that "[t]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit." *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003). By contrast, nonpoint sources are regulated by other provisions of the CWA; in particular, States are charged with identifying especially problematic nonpoint sources of pollution and developing "best management practices and measures" to reduce pollution from such sources. 33 U.S.C. § 1329; *see also id.* § 1288(b)(2)(F).

The difference between a "point source" and a "nonpoint source" of water pollution is thus a crucial threshold analytical step. The Act defines the former as "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." *Id.* § 1362(14). Any other source is, by exclusion, nonpoint. As courts have explained, certain types of pollution can readily be attributed to a specific, identifiable source or activity—like a factory discharging wastewater into a river. These are point sources. By contrast, nonpoint-source pollution

"arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *League of Wilderness Defenders / Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). The "most common example" is "residue left on roadways by automobiles.... When it rains, the rubber particles and copper dust and gas and oil wash off the streets" and soon "win[d] up in creeks, rivers, bays, and the ocean." *Id.*

2. The difference between point and nonpoint sources explains their differing treatment under the Act. Because point sources can be isolated, they are amenable to regulation by permits. *See* 33 U.S.C. §§ 1311(a), 1323(a). With point sources, it is easy to identify the cause of the pollution and the entity responsible for it; to force that responsible entity to obtain a permit; and to measure the pollution and enforce adherence to any effluent limitations imposed as a condition of the permit. By contrast, nonpoint sources cannot be discretely identified, and pollution attributable to them cannot be readily traced to particular acts or entities. Nor would it be feasible to enforce effluent limitations on such sources, due to the difficulty of measuring the degree of the pollution. "Because it arises in such a diffuse way," nonpoint-source pollution "is very difficult to regulate through individual permits." *Forsgren*, 309 F.3d at 1184. Instead, Congress recognized that it is better regulated by "best management practices" that address underlying causes. 33 U.S.C. §§ 1288, 1329.

Indeed, the CWA's legislative history suggests that it was precisely the varying suitability of these regulatory approaches that led to the creation of the

point/nonpoint distinction in the first place. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Congress wanted to require permits for all sources of pollution susceptible to such a scheme, and developed the notion of "point source" to embrace that category. The residual sources of pollution—*i.e.*, those that could not easily be subjected to a permitting scheme—are the "nonpoint" sources. *See id.* at 373 ("It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived; it instructed the EPA to study the problem and come up with a solution.").

3. There is no dispute that, if rain washes dirt or other sediment from roads (including forest roads), and those pollutants—without being channeled—ultimately wind up in rivers or streams, the resulting pollution derived from a "nonpoint source." Indeed, that is the quintessential example of nonpoint-source pollution: It is caused by a natural process (rain) over a dispersed area (roads) where pollutants are deposited gradually by multiple different actors (cars and the like) and then diffusely washed away. *See Earth Sciences*, 599 F.2d at 373 ("Congress was classifying nonpoint source pollution as disparate runoff caused primarily by rainfall around activities that employ or cause pollutants."); *Forsgren*, 309 F.3d at 1186 (describing nonpoint-source pollution as "runoff that picks up scattered pollutants and washes them into water bodies"). The original source of such runoff pollution could not be *less* "discernible," "confined," or "discrete"—and the actor responsible for the runoff, who could in theory be subjected to a permitting scheme, is not discernible either. Even the Ninth Circuit acknowledged that, in the ordinary

natural-runoff scenario, the pollution is from a nonpoint source. *See* Georgia-Pacific Pet.App.10a ("Stormwater that ... runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source as defined by [the CWA].").

Because forest-road runoff is not generally a point-source form of pollution, States such as Oregon have long regulated forest roads, pursuant to their duties under the CWA, to require "best management practices" and thereby minimize the environmental impact of the sedimentary runoff from such roads. Among other things, Oregon mandates that timber companies "provide a drainage system on new and reconstructed roads that minimizes alteration of stream channels and the risk of sediment delivery to waters of the state." Or. Admin. R. 629-625-0330(1).

4. At issue in this case is whether construction of drainage systems required by States like Oregon, which channel stormwater runoff through a series of ditches before reaching navigable waters, transforms the (now-minimized) pollution from nonpoint-source to point-source. In other words, does nonpoint-source pollution from forest roads become point-source pollution if the runoff is channeled by a drainage system on its way to navigable waters?

Even though the CWA provides a general definition of "point source," that definition does not resolve this question one way or the other. The Act defines a point source as a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). But here, the pollutants are initially discharged from forest roads and surrounding lands—which plainly do not constitute a "discernable, confined and discrete conveyance"—and only later are channeled through

ditches and culverts. Thus, the answer to the point/nonpoint inquiry depends on a temporal focus: When the pollutants are washed from their *original* source (the roads and lands), they cannot plausibly be described as coming from any point source. But drainage ditches that *ultimately* release the runoff into navigable waters, at least if viewed in isolation, could arguably be so characterized. The issue is thus inherently murky—like many line-drawing exercises that the Act requires.

5. So, pursuant to its delegated authority, the EPA promulgated more than thirty-five years ago a rule to address this question. Confronting the specific issue of pollution from silvicultural activities, the EPA "determined that most water pollution related to [these] activities is nonpoint in nature." 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976). The agency explained that this pollution "is basically runoff induced by precipitation events," and would be "more effectively controlled by the use of planning and management techniques" rather than a "permit program" and "effluent limitations." *Id.* The latter point strongly suggested that the runoff be classified as nonpoint, because Congress created the "point source" category to capture sources of pollution that could effectively be regulated through permits. Accordingly, the EPA concluded that "*ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation* are not meant to be" treated as point sources. *Id.* (emphasis added).

When it promulgated the final rule, the EPA further clarified the characteristics of forest-road runoff that render it a nonpoint source of pollution,

while recognizing that "no definition of point or nonpoint source can be exact or absolute." 41 Fed. Reg. 24,709, 24,711 (June 18, 1976). *First*, such pollution is "induced by natural processes" and therefore tends to derive from a dispersed area rather than a discrete source. *Id.* at 24710. *Second*, the pollutants are "not traceable to any discrete or identifiable facility," even if ultimately gathered and channeled by a drainage system. *Id.* Indeed, forest roads routinely "pass through multiple owners and multiple properties," and "ownership of the road does not necessarily correspond to the ownership of the forest land," creating "a highly complex mosaic of overlapping responsibilities." 77 Fed. Reg. 30473, 30,475 (May 23, 2012). This makes it particularly difficult to attribute responsibility for the runoff or to require a permit from any particular entity. *Third*, and partly for these two reasons, this type of water pollution is "better controlled" by "best management practices." 41 Fed. Reg. at 24,710. By contrast, "point sources of water pollution are generally characterized by discrete and confined conveyances from which discharges of pollutants into navigable waters can be controlled by effluent limitations." *Id.*

Consistent with these principles from the text and history of the CWA, the EPA promulgated a regulation—the "Silvicultural Rule"—which provides that "road construction and maintenance from which there is natural runoff" constitutes a "non-point source" of pollution. 40 C.F.R. § 122.27(b).

6. In the decision below, the Ninth Circuit held that the Silvicultural Rule was incompatible with the CWA. The court believed it to be "clear" that natural runoff from forest roads, when channeled through ditches and culverts, meets the statutory definition of

"point source," such that the EPA acted outside its authority by declaring otherwise. Pet.App.30a.

This refusal to defer to the EPA's determination was error. The EPA's treatment of forest-road runoff was, under basic *Chevron* principles, entitled to deference so long as it was a reasonable construction of an ambiguous CWA provision. *See Chevron*, 467 U.S. at 845. As shown above, it was. While the statute does define "point source," that definition is not self-applying; as even the Ninth Circuit admitted, "the EPA has some power to define point source and nonpoint source pollution where there is room for reasonable interpretation of the statutory definition." Pet.App.30a (quoting *Forsgren*, 309 F.3d at 1190). There is ample such room in this context, given that these pollutants—even though they are *ultimately discharged* via a discrete drainage system—*originally derive* from a quintessentially nonpoint source: naturally induced runoff from forest roads over a dispersed area and resulting from the acts of untold different entities. In that factual context, where the true, original source of the pollution cannot be traced or effectively regulated, and a permit scheme would therefore be impractical, it is fair to categorize the runoff as not deriving from a "discernible, confined and discrete conveyance." By refusing to uphold the EPA's classification to that effect, the Ninth Circuit contravened *Chevron*.

B. The EPA also reasonably declined to characterize natural forest-road runoff as "associated with industrial activity."

1. In 1987, Congress amended the CWA, adding a new provision, 33 U.S.C. § 1342(p), to govern the particular problem of stormwater discharges. All

stormwater discharges qualifying as "point sources" under the Act had previously required permits, but § 1342(p) created a new, more lenient, two-track regime under which only *some* stormwater point sources need permits. In particular, § 1342(p)(2) set forth five subcategories of stormwater discharges that (under so-called "Phase I" rules) would remain under the NPDES program. All *other* stormwater discharges were exempted from the permit scheme. *See id.* § 1342(p)(1)-(2). The EPA was tasked with conducting a study and then issuing regulations (called the "Phase II" rules) to govern these other discharges. *See id.* § 1342(p)(5)-(6).

2. There is no dispute that the EPA has not issued Phase II rules that would require NPDES permits for forest-road runoff. *See Envt'l Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 860-62 (9th Cir. 2003) (adjudicating challenge to EPA's failure to include forest-road runoff in its Phase II regulations). Rather, at issue here is whether such runoff triggers the requirement of an NPDES permit because it falls within one of the Phase I categories—in particular, the class of stormwater discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B).

Under the EPA's Phase I rules implementing § 1342(p), natural runoff from forest roads is clearly *not* "associated with industrial activity." The EPA, in defining that category, expressly stated that it "does not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). As explained, the Silvicultural Rule already categorically excluded forest-road runoff from NPDES. *See id.* § 122.27(b).

Thus, under the plain meaning of the regulations, forest-road runoff is not encompassed by Phase I.

Excluding forest-road runoff from the category of stormwater discharges "associated with industrial activity" is perfectly reasonable. As the EPA told the District Court below, forest roads are not directly associated with industrial activity, "within the traditional sense" of that term. Pet.App.124a. While forest roads allow access to logging sites, they also serve other purposes (such as recreation) and are geographically and functionally remote from logging. And logging is not a traditional "industrial" activity in any event; it is more closely akin to agricultural harvesting. The EPA's exclusion of forest-road runoff from Phase I (through the cross-reference to the Silvicultural Rule) is thus entirely consistent with § 1342(p)(2)(B).

3. The Ninth Circuit, however, ruled that forest-road runoff *is* "associated with industrial activity." *See* Pet.App.42a. The court did not say that the CWA amendments compelled that result; rather, the court reached its conclusion only by parsing the regulatory definition of the phrase that the EPA provided in 40 C.F.R. § 122.26(b)(14), including the regulation's use and explications of the words "immediate," "facility," and "industrial." *See* Pet.App.39a-42a.

This was error. Again, it cannot be disputed that, under *Chevron*, the EPA *could permissibly* deem forest-road runoff outside the statutory category of stormwater discharges "associated with industrial activity"; literally every word of that phrase is ambiguous, admits of degree, and requires concrete application. The only question, therefore, as evidenced by the Ninth Circuit's reliance on the

EPA's regulatory elaboration, is whether the *regulation* includes forest-road runoff. On that question, the agency is entitled under *Auer* to great deference—indeed, the agency's construction is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). And the EPA made perfectly clear, in briefs submitted in this very litigation, that it "never contemplated that forestry roads would be included within the industrial activities subject to the Phase I regulations." Pet.App.123a.

Far from being "plainly erroneous or inconsistent with the regulation," *Auer*, 519 U.S. at 461, the EPA's interpretation of § 122.26(b)(14) is *compelled* by it. After all, the regulation expressly excludes from the definition of "associated with industrial activity" all of the stormwater discharges that the Silvicultural Rule deems to be nonpoint sources of pollution (and thus already exempt from the NPDES scheme), including natural runoff from forest roads.

The Ninth Circuit appears to have simply set that portion of § 122.26(b)(14) aside, saying only that the cross-reference to the Silvicultural Rule "does not, indeed cannot" exempt forest-road runoff from the class of Phase I stormwater discharges. Pet.App.42a. Why not is unclear. There is no reason why the EPA could not (for good cause) exempt the runoff from its otherwise applicable definition of "associated with industrial activity." Even if the Silvicultural Rule was, as the court held, *ultra vires*, the EPA's authority for purposes of defining "point sources," § 122.26(b)(14) cross-references the Rule for another purpose—*viz.*, setting the parameters of the class of

discharges "associated with industrial activity"—and the statute clearly does not forbid *that* classification.

In short, the CWA requires permits only (as relevant here) for the vague category of stormwater discharges "associated with industrial activity." The EPA reasonably determined that natural runoff from forest roads does not fall into that category, and said so—in its regulation, and to the court. By resting on a contrary understanding of the EPA regulations to nonetheless conclude otherwise, the Ninth Circuit violated the *Auer* deference principle.

II. There Is Every Reason to Accord Deference Here, and No Reason to Discard the EPA's Considered, Expert, and Long-Held Judgment.

Deference to expert agencies, whether as to the meaning of statutes or the proper application of regulations, offers many benefits, as this Court has repeatedly recognized. Agencies are more competent than courts to resolve questions that implicate technical or scientific policy concerns; agencies are more politically accountable for the impacts of their determinations; and agencies alone can offer advance guidance, applicable on a national level, about the meaning of a statute or regulation, fostering the values of clarity, predictability, and fairness.

At the same time, deference is not always warranted and should not always be available. This Court, its individual Justices, and academic commentators have on occasion remarked on the potential dangers of deference and outlined some of the situations in which it should not be accorded.

In this case, however, all of the grounds for deference are present and none of the grounds to

withhold deference is implicated. Deference to the EPA on the question of the proper treatment under the CWA of natural runoff from forest roads would advance the important values of fair notice and predictable enforcement of the law; it would allow an expert agency to decide a question that falls squarely within its core competence (and well outside the judicial bailiwick); and it would comport with the structure of agency incentives that administrative law should help to promote. Under *any* view of the appropriate conditions for deferring to an expert agency, such deference is warranted here.

A. Only deference to the EPA's longstanding approach toward forest-road runoff would respect fair notice and the rule of law.

In general, allowing agencies to construe ambiguous legal texts promotes consistency, uniformity, and predictability in the law. Unlike courts, agencies are able to consider the meaning of statutes and regulations *before* concrete disputes arise over their application. *Compare* 5 U.S.C. § 553 (authorizing agencies to promulgate rules), *with* U.S. Const. Art. III (granting judiciary power to resolve only "cases" and "controversies"). Thus, only agency interpretations can effectively give regulated entities advance notice about what conduct would violate the law. Moreover, apart from this Court, only agencies are able to give *national* guidance about the law.

Deference to agency interpretations thus "imparts (once the agency has spoken to clarify the [law]) certainty and predictability to the administrative process." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). Indeed, "without the assurance that reviewing courts will

accept reasonable and authoritative agency interpretation of ambiguous provisions," it would be "impossible to achieve predictable ... administration of the vast body of complex laws committed to the charge of executive agencies." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring in part and in judgment). Ordinarily, then, these values counsel in favor of deference to administrative agencies.

That general principle, however, holds only to the extent that an agency adopts an interpretation in advance and then adheres to it. When, instead, an agency *reverses* its longstanding position on the meaning of a statute or regulation, the values of fair warning and adequate notice may require rejection of the new position. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (refusing to defer to Secretary's interpretation of statute where his "current interpretation ... is contrary to the narrow view ... advocated in past cases"). Similarly, an agency's acquiescence in a certain practice—even if not accompanied by an express position on its legality—may make it inappropriate to defer to a subsequent determination that the practice violates the law. For example, in *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156 (2012), this Court found, as one "strong reaso[n] for withholding the deference that *Auer* generally requires," that a regulatory interpretation adopted by the Department of Labor would "impose potentially massive liability ... for conduct that occurred well before that interpretation was announced." *Id.* at 2167. Despite "decades-long practice" by industry, the Department had "never initiated any enforcement actions ... or otherwise suggested that it thought the industry was

acting unlawfully." *Id.* at 2168. Deference under those circumstances, this Court held, would create an "acute" risk of "unfair surprise." *Id.*

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Id.

Here, the "EPA's construction was made [nearly] contemporaneously with the passage of the Act, and has been consistently adhered to since." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982). The Silvicultural Rule, which expressly categorizes forest-road runoff as a nonpoint source of pollution, was proposed and promulgated in 1976, only a few years after the CWA was enacted. *See* 41 Fed. Reg. at 6282; *id.* at 24,709. Over the ensuing thirty-five years, the EPA has never deviated from its position that operators of forest roads need not obtain NPDES permits for such naturally induced runoff. To the contrary, the EPA has repeatedly reaffirmed its view on the question. *See, e.g.*, 55 Fed. Reg. 20,521, 20,522 (May 17, 1990) (reaffirming "longstanding view" that "runoff from ... forest lands," "although sometimes channeled," is "non-point source in nature" because it is "caused solely by natural processes," is "not otherwise traceable to any single identifiable source," and is "best treated by non-point source controls"); *see also* 65 Fed. Reg.

43,586, 43,652 (July 13, 2000) (setting aside, after notice-and-comment, proposal to amend Silvicultural Rule).

Likewise, there is no dispute that the EPA, since the enactment of the new stormwater regulatory regime in 1987 and the EPA's subsequent effort to flesh out the "Phase I" categories of discharge that require permits, has adhered to the position that forest-road runoff does not require an NPDES permit. *See* 40 C.F.R. § 122.26(b)(14). It has advanced that same view in litigation, including this case. *See, e.g.*, Pet.App.91a (affirming in 2003 that "storm water discharges from forest roads are not currently subject to NPDES permit requirements"); Pet.App.127a (reaffirming to district court "interpretation of EPA's [Phase I] storm water regulations to exclude forestry road construction and maintenance activities").

Given that the EPA has, for nearly four decades, held firm to an interpretation of the CWA under which forest-road operators need not obtain permits for naturally induced runoff however it ultimately reaches navigable waters, the values of predictability and fair-notice would here be served by deference. This case thus presents the opposite scenario as *Christopher*. Here, it would be the *judicial* act of refusing to defer that would present the "acute" risk of "unfair surprise." *Christopher*, 132 S. Ct. at 2168. Adapting this Court's teaching in that case:

> It is one thing to expect regulated parties to conform their conduct to an [court's] interpretations once the [court] announces them; it is quite another to require regulated parties to divine the [court's] interpretations in advance or else be held liable when the

> [court] announces its interpretations for the first time in [a citizen lawsuit] and [denies] deference [to the agency's contrary view].

B. Determining the best approach toward water pollution is within the EPA's unique expertise, as Congress understood.

Another obvious benefit of deference to expert agencies is that it puts determinations bearing major policy implications into the hands of those best suited to understand those implications. The regulatory schemes overseen by agencies are usually complex and specialized. "[T]o administer a congressionally created ... program necessarily requires the formulation of policy," because no statute will foresee and resolve its every potential application. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Construing and applying a statute thus often "involve[s] reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation ... depend[s] upon more than ordinary knowledge respecting the matters"—often technical or scientific in nature—"subjected to agency regulations." *United States v. Shimer*, 367 U.S. 374, 382 (1961).

Courts, of course, lack that type of expertise. *See Chevron*, 467 U.S. at 865 ("Judges are not experts in the field ...."). But agencies are created precisely to develop and house it; they possess "special expertise" at the "frontiers" of their fields. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). Thus, when it comes to applying a statute like the Clean Water Act or its regulations, it is agencies like the EPA—not the federal courts—that are best positioned to appreciate and weigh the policy consequences of differing constructions of the law.

See Chevron, 467 U.S. at 865-66 (holding that challenge to agency construction must fail if it "really centers on the wisdom of the agency's policy").

Indeed, the relative competence of agencies and courts explains why it is generally fair to construe—as *Chevron* famously does—statutory gaps as implicit congressional delegations to the agency charged with administering the law. *See id.* at 844 (observing that statutory ambiguity can reflect "implicit" "legislative delegation to an agency"). Congress is aware that it cannot make every decision on its own, in advance, and by leaving ambiguity in statutory text for agencies to resolve, it recognizes "that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so." *Id.* at 865.

To be sure, this Court and some of its Members have observed that not *every* question of statutory construction presents the type of policy-laden question that agencies are best suited to answer. In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), for example, the Court was presented with a "pure question of statutory construction," rather than a dispute over application of a legal standard "to a particular set of facts." *Id.* at 446, 448. With respect to that type of question—which "is well within the province of the Judiciary," *id.* at 448, and which does not implicate the agency's unique competence to the same degree—the assumption of implicit legislative delegation to the agency is more dubious. In such instances, judicial deference to the agency's interpretation may be unwarranted. *See id.* at 446 (holding that this "pure question of statutory construction" was "for the courts to decide"); *accord*

Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring in part and dissenting in part) ("Courts are expert at statutory construction, while agencies are expert at statutory implementation.").

In this case, in contrast, the disputed questions plainly involve "applying law to fact," not "pure questions of statutory construction." *Id.* at 531. Applying the nebulous point/nonpoint distinction to the particular case of naturally induced runoff from forest roads that is channeled through a series of ditches to navigable waters, and deciding whether that runoff falls within the category of stormwater discharges that is "associated with industrial activity," both require applying statutory legal tests to highly fact-specific contexts. Both trigger the inherent exercise of policymaking discretion, because classifying forest-road runoff as "point" or "nonpoint," or as "associated with industrial activity" or not so associated, determines to which regulatory regime it will be subjected. Importantly, what is ultimately disputed here is not *whether* to regulate forest-road runoff, but *how* to best regulate it—and that question can be effectively answered only by those with "more than ordinary knowledge respecting the matters." *Shimer*, 367 U.S. at 382. Application of the CWA, in other words, "require[s] scientific and technical expertise." *Nat'l Wildlife*, 693 F.2d at 167. Congress knew that—which is why it left the EPA substantial discretion to fill the law's ambiguities.

In particular, "Congress expressly meant EPA to have not only substantial discretion in administering the Act generally, but also at least some power to define the specific ter[m] 'point source.'" *Id.*; *accord Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d

1369, 1382 (D.C. Cir. 1977) ("We agree with the District Court 'that the power to define point and nonpoint sources is vested in EPA.'"). As one of the lead sponsors of the CWA explained, "[g]uidance with respect to the identification of 'point sources' and 'nonpoint sources' ... will be provided in regulations and guidelines of the Administrator." 117 Cong. Rec. 38,816 (1971) (Sen. Muskie). Indeed, the dispute over what constitutes a "point source" for the CWA is strikingly reminiscent of the dispute over the definition of a "stationary source" for the Clean Air Act—which gave rise to *Chevron*, and was treated as the quintessential example of an ambiguity for the EPA to resolve. *See* 467 U.S. at 860-62.

Likewise, in enacting the stormwater-discharge amendments, Congress *expressly* delegated to the EPA much of the responsibility for addressing this issue. "Congress use[d] clear language in [33 U.S.C.] § 402(p)(5)-(6) to grant EPA discretion to determine that certain stormwater discharges require regulation while others do not." *Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 330 (D. Vt. 2004), *aff'd*, 139 F. App'x 3381 (2d Cir. 2005); *see also Envt'l Def. Ctr.*, 344 F.3d at 869 (reviewing Phase II regulations with "great deference because we are reviewing the agency's technical analysis and judgments ... within [its] technical expertise"). Of course, Congress enumerated, albeit in vague terms, the five categories of stormwater discharges that were to remain subject to NPDES permit requirements. But, through its recognition of the EPA's policy authority in this area, the express delegation as to Phase II nonetheless bolsters the presumption of an *implicit* delegation as to Phase I.

In sum, the nature of the questions at issue in this case directly implicates one of the basic rationales for agency deference—the comparative advantage of scientifically expert agencies over inexpert courts.

C. Deferring to the EPA would encourage it to write specific regulations, whereas judicial usurpation would encourage agencies to promulgate only vague generalities.

Notwithstanding the many benefits of deferring to agency interpretations, "it has been argued that the Supreme Court should abandon deference to agency interpretations of ambiguous regulations, because it arguably creates perverse incentives for an agency to draft vague regulations that give inadequate guidance." *Paralyzed Veterans of Am. v. DC Arena, L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).

On this view, advanced most prominently by Professor John Manning in his article, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996), while *Chevron* deference appropriately divides the power to make law (exercised by Congress) from the power to interpret it (exercised by the agency), *Auer* deference combines these two functions, giving agencies the power to interpret regulations that they themselves promulgated. *Id.* at 654. The problem with such a system—and why the Framers of the Constitution adopted the separation of powers—is that combining lawmaking with law-exposition poses a threat of arbitrary government. It destroys any "incentive to enact rules that impose clear and definite limits upon governmental authority," instead encouraging "adop[tion of] vague and discretionary grants of power" that maximize

future power. *Id.* at 647. Deferring to an agency's interpretations of its own rules could thus "push an agency toward regulatory imprecision," *id.* at 655, a result that administrative law ought to prevent.

Although this Court has generally adhered to *Auer* despite this critique, several Justices have taken note of the doctrine's potential for abuse. In *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), Justice Thomas (joined by Justices Stevens, O'Connor, and Ginsburg) observed in dissent that the agency had "merely replaced statutory ambiguity with regulatory ambiguity." *Id.* at 525. As such, he wrote, deference to the agency's interpretation of its "hopelessly vague regulation" would "disserv[e] the very purpose behind the delegation of lawmaking power to administrative agencies," *i.e.*, resolving ambiguity, and would fail to provide "clear and definite" guidance to regulated parties. *Id.* More recently, Justice Scalia echoed Professor Manning's warning that "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases," thus "frustrat[ing] the notice and predictability purposes of rulemaking." *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring). And it is notable that in last Term's *Christopher* case, in which this Court declined to defer to the Department of Labor's interpretation of its own regulation, that regulation did not add any meaningful elaboration to the critical statutory phrase "outside salesman," and simply "adopt[ed] the broad statutory definition of 'sale'" as its own. 132 S. Ct. at 2167.

In light of these concerns, there may be reason to withhold *Auer* deference when the agency—instead of

using its regulatory authority to *clarify* the statute's meaning—has simply *parroted* it, promulgating unduly vague regulations that it hopes to later "interpret" as it sees fit. Under those circumstances, deference would only encourage arbitrariness.

This, however, is decidedly not such a case. As to both of the questions at issue, the EPA issued clear regulations that set forth its interpretations of the law. With respect to the definition of "point source," the EPA's Silvicultural Rule definitively determined that "road construction and maintenance from which there is natural runoff" constitutes a "non-point source." 40 C.F.R. § 122.27(b). The agency made abundantly clear, in its explanation for the rule, that this was the case even if "ditches, pipes and drains" would "channel, direct, and convey" the runoff. 41 Fed. Reg. at 6282. Even the Ninth Circuit conceded that the agency's intent on this point was clear. *See* Pet.App.32a. With respect to whether forest-road runoff qualifies as "associated with industrial activity," the agency was equally unambiguous, expressly defining that category to exclude anything that the Silvicultural Rule declared to be nonpoint in nature. *See* 40 C.F.R. § 122.26(b)(14).

By issuing "clear and definite" guidance on the meaning of the statutory terms, *Thomas Jefferson Univ.*, 512 U.S. at 525, the EPA bound itself to its stated approach, eliminating the risk of arbitrary government that may otherwise result from joinder of the lawmaking and law-exposition powers (and inviting Congress to step in if it disagreed with the EPA's approach, which it tellingly did not). Because the EPA made its intent clear up-front, manifesting that intent in plain regulations, this is not a case

where deference would "encourage the agency to enact vague rules." *Talk Am.*, 131 S. Ct. at 2266.

To the contrary, it is the Ninth Circuit's approach, if anything, that would encourage such perversity. After all, the Ninth Circuit concluded that forest-road runoff was "associated with industrial activity" only by extensively parsing the agency's own, precise definitions of some of those terms—while ignoring the part of the rule that clearly excluded the forest-road runoff from their scope. *See* Pet.App.39a-42a. The lesson to any agency seeking to protect its own authority would be: "No good deed goes unpunished." Had the EPA offered *no* advance, binding guidance about the meaning of "associated with industrial activity," the Ninth Circuit never would have been able to conclude that the forest-road runoff fit unambiguously within that category. In effect, the Ninth Circuit used the EPA's precision against it, and therefore against the objectives of fairness and certainty to regulated parties. Affirmance would therefore "push [agencies] toward regulatory imprecision," Manning, *supra*, at 655, a result at odds with the basic values of administrative law.

Courts should not be blind to the incentives created by agency deference in particular cases, and sometimes that may require withholding the great deference that *Auer* ordinarily accords. In this case, however, deferring to the EPA's longstanding and definitive approach toward forest-road runoff would recognize its responsible exercise of administrative authority, and encourage similar such behavior.

* * *

Deference to agencies is not an unqualified good, but on any view of deference, its rationales, and its

scope, it is warranted here. "The usual factors, then (regulatory agency, contemporaneous construction, expertise, congressional acquiescence, thoroughness) generally support giving great deference to EPA's interpretation." *Nat'l Wildlife*, 693 F.2d at 170.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the decision below and to defer to the EPA's reasonable classifications of the forest-road runoff at issue here.

Respectfully submitted,

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DOUG DECKER, in his official capacity as Oregon State Forester, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION AND INTEREST OF THE AMICI CURIAE

The parties' consent to the filing of this brief was filed with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Amici Curiae are law professors who research, teach, and write on federal environmental law as well as administrative law. They are concerned in this case by the Government's claim – in the face of clear statutory language and announced for the first time in this litigation – that the Environmental Protection Agency (EPA) regulations are unclear and that, because those regulations are now supposedly ambiguous, this Court should defer to the agency's new interpretation of those regulations. More information about the specific interest of each professor is provided below.

Lincoln L. Davies is a Professor of Law at the University of Utah S.J. Quinney College of Law. Professor Davies' research and teaching interests center on energy and environmental law and policy, administrative law, and water law.

Eric T. Freyfogle is the Guy Raymond Jones Chair in Law at the University of Illinois College of

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[1] In accordance with Supreme Court Rule 37.6, Amici Curiae certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than Amici Curiae, has made a monetary contribution specifically for the preparation or submission of this brief.

Law. He is the author or editor of a dozen books dealing with issues of humans and nature, and is the co-author of two casebooks, *Property Law: Power, Governance, and the Common Good* (Thomson/West 2012) and *Wildlife Law: Cases and Materials* (Foundation Press, 2002; 2d ed. 2010). Seven of his law review articles have been reprinted, as among the best articles of the year, in the annual volume *Land Use & Environment Law Review*.

Noah Hall is an Associate Professor of Law at Wayne State University Law School and is a frequent Visiting Professor at the University of Michigan Law School. His teaching and expertise is in environmental and water law, and his research focuses on public and private water rights, transboundary water management and pollution, climate change adaptation, U.S.-Canadian environmental law, and citizen enforcement. He is a co-author of two casebooks, *Environmental Law and Policy: Nature, Law, and Society* (Aspen Publishers) and *Modern Water Law: Private Property, Public Rights, and Environmental Protection* (Foundation Press).

Amanda Cohen Leiter is an Associate Professor of Law at the American University Washington College of Law. Her teaching and research interests include torts, administrative law and process, and environmental law and policy.

Dave Owen is an Associate Professor of Law at the University of Maine School of Law. He teaches courses on environmental, natural resources, water,

and administrative law, and his research focuses largely on water resource management. Several of his articles have focused on the Clean Water Act's coverage of stormwater.

Jessica Owley is an Associate Professor at SUNY Buffalo Law School where she teaches environmental law, property, and land conservation. Her research covers those areas as well as administrative law and statutory interpretation.

Zygmunt J. B. Plater is Professor of Law at Boston College Law School, teaching and researching in the areas of environmental, property, land use, and administrative agency law. Over the past 30 years he has been involved with a number of issues of environmental protection and land use regulation. He is lead author of *Environmental Law and Policy: Nature, Law, and Society*, now in its fourth edition, Aspen Publishers, 2010.

William H. Rodgers, Jr. is the Stimson Bullitt Endowed Professor of Environmental Law at the University of Washington School of Law. He specializes in natural resource law and is recognized as a founder of environmental law. He is the author or co-author of dozens of books, casebooks, and articles, including his four-volume treatise, *Environmental Law* (Thomson/West).

Colette Routel is an Assistant Professor of Law at the William Mitchell College of Law. Her teaching and research interests include administrative law,

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Ryan Stoa is Program Executive Officer of the Global Water for Sustainability Program at Florida International University, where he teaches Water Resources Law, the Environmental Law and Policy Clinic, and Integrated Solutions for Water in Environment and Development.

STATEMENT

In order to control water pollution in the nation's waters, the Clean Water Act requires a permit for any discharge into navigable waters from a "point source." *See* 33 U.S.C. §§ 1311(a), 1342(a) (2012). Permits do not eliminate discharges. They instead set limits based on national standards that determine the appropriate treatment of polluted water before it is added to a larger body of water such as a river or a lake. *See id.*

Respondent filed this suit six years ago alleging that private logging corporations harvesting timber in the Tillamook State Forest were violating the Clean Water Act by discharging stormwater into navigable waters without a permit. 2JA 2; Pet. App. 55a. Respondent's concern stemmed from a man-made water collection and drainage network created along logging roads and used by logging corporations to collect polluted stormwater generated by logging operations. 2JA 2, 15, 17-18. The water in the culverts, ditches,

and pipes of the system eventually flows into rivers and their tributary streams. *Id.*

Because the Clean Water Act defines the terms "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged," 33 U.S.C. § 1362(14), and because the Act requires permits for all stormwater discharges "associated with industrial activity," *id.* § 1369(p)(3)(A), Respondent contends that, based on the plain language of the statute, these are discharges from point sources that require a permit. The EPA, however, argues that this Court should exempt these discharges from permits based on its interpretation of several regulations that it now claims are ambiguous. *See* U.S. Br. at 19-32.

SUMMARY OF ARGUMENT

The Government's brief in this case is striking. After being on notice for decades that the EPA has a duty to regulate point source discharges of stormwater from logging operations, the Government now says that the EPA's regulations related to those discharges are ambiguous. The Government then asks this Court to defer to the EPA's interpretations of those regulations announced "for the first time" in this case.

This Court should give effect to the clear terms of the Clean Water Act. It should not be persuaded to do otherwise by the EPA's late claim that the regulations are ambiguous and that it must now interpret those regulations. Even assuming that those regulations are ambiguous, (and it is not clear that they are), the Court should not afford deference (1) when the agency has not been suitably mindful of congressional intentions and (2) when deferring to an agency interpretation would increase the risk of arbitrariness. In those cases, deferring to an agency raises separation of powers concerns and would therefore be inappropriate.

In this case, although Congress has neither exempted silvicultural activities nor all stormwater discharges from the National Pollutant Discharge Elimination System (NPDES) permit requirement, the EPA's interpretation of its regulations would do just that. This Court owes no deference to an interpretation that is contrary to the legislative structure and control that Congress has otherwise seen fit to exercise in this area.

Even if the Act itself did not resolve this case, deferring to the EPA's interpretation would still be inappropriate because it would raise insurmountable separation of power concerns. The EPA's approach to regulating silvicultural point sources has been plagued with a history of rebukes by courts and Congress that, not coincidentally, illustrate the resistance of the agency to follow clear statutory mandates. In particular, since 1975, courts relying on the

plain language of the Act have repeatedly told the EPA that it cannot exempt these point sources. Rebukes have also come in the form of Congressional amendments to force regulatory action where the EPA had been reluctant to regulate stormwater discharges.

The final indicia that deference in this case is inappropriate stems from the fact that both the Silvicultural Rule and the Phase I rule, if interpreted in the way urged by the EPA, would implicate the Court's concerns regarding open-ended and imprecise regulations. In particular, the EPA seeks to refine the Phase I rule for the first time through this litigation. Whereas the Phase I rule is clear in its inclusion of logging as an industrial activity, the EPA now argues that timber hauling and access for big machines necessary to log, both of which are essential to logging, are not industrial activities. To accomplish this spontaneous carve-out, the Court would have to read imprecision into the rule. Doing so would create significant latitude for the agency to decide on an ad hoc basis that which it is otherwise required to do through notice and comment rulemaking – namely identify industrial activities whose stormwater discharges are subject to the NPDES permit program. In other words, accepting the EPA's interpretation would allow the EPA to create de facto new regulations through the interpretive process. *Auer* deference is therefore inappropriate.

Finally, because the EPA's interpretation is inconsistent with the underlying statutory mandates of the Clean Water Act, because it lacks thoroughness in

that it was announced for the first time in an amicus brief in this litigation, and because courts have found that the EPA's reasoning in prior efforts to exempt silvicultural sources from the NPDES program suspect for nearly four decades, the EPA's reasoning is "wholly unpersuasive" and should be afforded no deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

ARGUMENT

One of the most debated questions in administrative law is the proper deference to afford agency interpretations of both statutes that they administer and regulations that they promulgate. Commentators have long debated when and why deference to agency interpretations is afforded, with many questioning whether deference is appropriate at all. *See, e.g.*, Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 562 (2009); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN L.J. AM. U. 1, 11-12 (1996); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613-14 & nn.9 & 10 (1996). Similarly, Justices on this Court have questioned the application of deference in various contexts. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (questioning

the Court's re-adoption of *Skidmore* deference in lieu of applying *Chevron* deference); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 295-96 (2009) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the articulation of deference in that case for being too complicated).

Central to this case is the question of what deference, if any, is owed to an agency interpretation of its own supposedly ambiguous regulations. Although the Court embraced a general principle of deference in this context in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), Professor John Manning has warned that deference in this situation raises a separation of powers problem: "*Seminole Rock* leaves an agency free both to write a law and then to 'say what the law is' through its authoritative interpretation of its own regulations." 96 COLUM. L REV. at 618. Because "administrative agencies exercise[ ] delegated lawmaking authority, as well as perform[ ] executive and adjudicative functions," Professor Manning has argued that "it is crucial to have some meaningful external check upon the power of the agency to determine the meaning of the laws that it writes." *Id.* at 682. He has therefore urged the Court to "replace *Seminole Rock* with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning." *Id.* at 617.

Similarly, Professor Robert Anthony has argued that *Seminole Rock* deference should be abandoned in favor of respectful consideration to the agency position:

> Agencies will realize that they can issue such documents – creating tangible meaning where the regulations did not – with a high degree of confidence that their interpretations, issued without notice and comment, will be upheld because they are not inconsistent with the regulation. This prospect generates incentives to be vague in framing regulations, with the plan of issuing "interpretations" to create the intended new law without observance of notice and comment procedures.

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN L.J. AM. U. 1, 11-12 (1996).

Skepticism of *Seminole Rock* or *Auer* (based on *Auer v. Robbins*, 519 U.S. 452, 461 (1997)) deference, which inspired Professor Manning's and Professor Anthony's articles, can be found in several of this Court's cases. *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process."); *cf. Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (finding *Auer* deference inappropriate because "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."). The concern has been particularly pointed in the last two Terms.

In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012), the Court declined to afford the agency interpretation *Auer* deference after noting that *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit. . . ." In that case, the Court determined that the requisite fair notice was lacking: "to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference" would be unfair. *Id.*

Similarly, in *Talk America v. Michigan Bell Telephone*, 131 S. Ct. 2254 (2011), Justice Scalia announced that "while I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly doubtful of its validity." *Id.* at 2266 (Scalia, J., concurring). Justice Scalia then echoed the concern raised by Professor Manning:

> It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. . . . [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.

Id. The problem with applying *Auer* deference in *Talk America*, Justice Scalia explained, was that it involved "an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." *Id.* In other words, *Auer* deference is

inappropriate in situations in which an agency has repeatedly ignored statutory language in seeking the same end.

In order to ensure an external check on the consolidation of power in the administrative state that troubled Justice Scalia in *Talk America* and led to concerns in *SmithKline Beecham*, the Court should be cautious in affording *Auer* deference when there are indicia of separation of powers concerns. Such indicia arise when the agency has not been suitably mindful of congressional intentions – whether those intentions appear in the form of limits on delegated authority or legislative mandates – and when deferring to an agency interpretation would increase the risk of arbitrariness. In this case, several indicia implicate separation of powers concerns. First, as in *Talk America*, the agency interpretation in this case is inconsistent with the statutory language. Second, also as in *Talk America*, the agency interpretation has a history of repeated rebukes by courts and Congress. Finally, like *SmithKline Beecham*, the agency's interpretation has the potential to generate such great imprecision that it fails to afford the requisite fair notice.

I. *AUER* DEFERENCE IS INAPPROPRIATE WHERE AN AGENCY INTERPRETATION CONTRAVENES CLEAR STATUTORY MANDATES.

Agencies are empowered to act only when they have been delegated authority by Congress to do so.

See, e.g., Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001) ("[W]hen Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). As such, the Court has long held that, in order for an agency's interpretation of a statute to be given any weight, it must be consistent with the statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1983).

Likewise, this Court has also explained that interpretations of agency regulations must be consistent with the statute. *See, e.g., Stinson v. United States*, 508 U.S. 36, 47 (1993) (requiring that an interpretation of a regulation, among other things, "does not run afoul of the Constitution or a federal statute"); *see also Natural Res. Def. Council, Inc. v. United States Envtl. Protection Agency*, 25 F.3d 1063, 1070 (D.C. Cir. 1994) (Sentelle, J.) ("Of course, however reasonable the agency's interpretation of its regulations, we must not give those regulations effect if they conflict with the governing statute."). As such, in order to avoid both separation of powers concerns and delegation questions, this Court will not give effect to an interpretation of regulations that is inconsistent with the statute under which the relevant regulations were passed. In other words, regulatory interpretations that contravene clear statutory mandates warrant no deference.

The Government, however, contends that this Court may not look to the underlying statute because that effort would bring into question the validity of the regulations at issue. *See* U.S. Br. at 20-21. Implicit in this argument is the suggestion that the Government can offer an interpretation that contradicts the clear language of the statute and this Court should nevertheless defer to it. That simply makes no sense. This Court should not give effect to any proffered interpretations of regulations that contravene

the plain text of the Clean Water Act's definition of "point source" or its Stormwater Amendments.[2]

II. *AUER* DEFERENCE IS INAPPROPRIATE WHEN AN AGENCY'S INTERPRETATION OF A REGULATION IS MARKED BY A HISTORY OF REBUKES BY COURTS AND CONGRESS.

As Justice Scalia explained in *Talk America*, the "inappropriateness of *Auer* deference is especially evident in cases . . . involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends." 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). The EPA's approach to regulating silvicultural point sources has been plagued with a history of rebukes by courts and Congress that, not coincidentally, illustrate the resistance of the agency to follow clear statutory mandates. Those rebukes have come in the form of direct invalidations by courts in the face of the EPA's attempt to exclude point sources from regulation. They have also come in the form of Congressional amendments to force regulatory action where the EPA has otherwise been

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[2] To the extent Petitioners and the Government argue that this Court should disregard the statute because of the presence of 33 U.S.C. § 1369(b), Respondent has explained why that statute does not alter ordinary rules of interpretation. Resp. Br. 20-22.

reluctant to regulate stormwater discharges. A short review of the regulatory history in this case highlights not only the rebukes but also the EPA's minimal efforts to meet statutory mandates even in the face of rebukes. Together, the rebukes and the EPA's actions in response suggest that this Court cannot defer to the EPA's regulatory interpretation regarding silvicultural point sources.

A. Past and Present Forms of the Silvicultural Rule Have Been Rejected By Courts to the Extent that the Rule Excludes Statutory Point Sources From Regulation.

1. In 1973, the EPA adopted regulations to establish the scope of the NPDES permitting program. *See* 38 Fed. Reg. 18,000 (July 5, 1973). Though the Clean Water Act requires NPDES permits for all point source discharges, the EPA attempted to limit the scope of the permitting program only to certain types of point sources. *See id.*; *see also* 41 Fed. Reg. 6281, 6281 (Feb. 12, 1976). In particular, the EPA attempted to exempt categorically all silvicultural activities from the NPDES program. *See* 41 Fed. Reg. at 6281.

Shortly after the EPA purported to exempt certain point sources from coverage under the Clean Water Act, the U.S. District Court for the District of Columbia rejected the EPA's approach. *NRDC v. Train*, 396 F. Supp. 1393 (D.D.C. 1975). The court explained that

"there is no evidence from the language of the statute to support the categorical exemptions of point sources granted by the Administrator." *Id.* at 1398. In addressing the EPA's concerns regarding administrative feasibility, the court concluded that "the statutory framework now at issue appears too tightly drawn to allow the interpretation made by the EPA." *Id.* at 1400. The court's conclusion was consistent with congressional pronouncements at the time of enactment: "In the past, too many of our environmental laws have contained vague generalities. What we are attempting to do now is provide laws that can be administered with certainty and precision. I think that is what the American people expect that we do." 117 Cong. Rec. 38,805 (1971) (Statement of Senator Jennings Randolph of West Virginia, Chairman of the Senate Committee responsible for the Clean Water Act).

As a result, the district court in *Train* vacated the 1973 Rule, including the silvicultural exclusions, and remanded the issue to the EPA to propose and promulgate regulations "extending the NPDES permit system to include all point sources." *See* 41 Fed. Reg. 6281, 6281 (Feb. 12, 1976) (quoting district court's remand order). The district court's conclusions were consistent with the House Committee on Government Operations, which had been monitoring the EPA's administration of the 1972 Clean Water Act. In the context of discussing the EPA's exclusions for confined feedlots of a certain size, the subcommittee remarked that "there is no legal basis for EPA's

administrative exclusion of any point source from the NPDES permit program under the Federal Water Pollution Control Act. The law requires that all point sources be subject to the permit program." *See* Subcommittee Staff Memorandum of March 11, 1974, printed in House Comm. on Government Operations, Control of Pollution From Animal Feedlots and Reuse of Animal Wastes, H.R. Rep. No. 93-1012, 93 Cong., 2d. Sess. 55-60 (1974), cited by *Train*, 396 F. Supp. at n.6.

On appeal, the D.C. Circuit affirmed the *Train* decision, explaining that the EPA could not exempt point sources from the NPDES program:

> The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from permit requirements of § 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute.

NRDC v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977). In reaching this conclusion, the court gave detailed consideration to the EPA's arguments that technological and feasibility limitations justified a categorical exclusion for agricultural, silvicultural, and storm sewer runoff. *See Costle*, 568 F.2d at 1377-83. While the court discussed various tools that the Clean Water Act provided the EPA to alleviate technological limitations and administrative burdens, the court concluded that Congress did not intend regulatory

exclusions to be included in those tools: "We find a plain Congressional intent to require permits in any situation of pollution from point sources. We also discern an intent to give EPA flexibility in the structure of the permits, in the form of general or area permits." *Id.* at 1383.

2. In the wake of *Train* and *Costle*,[3] the EPA adopted new regulations. *See* 41 Fed. Reg. 6281, 6281 (Feb. 12, 1976) (Proposed Rule); 41 Fed. Reg. 24,709 (June 18, 1976) (Final Rule). In those regulations, the EPA identified silvicultural point sources that would be subject to regulation under the NPDES program:

> The term "silvicultural point source" means any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters.

41 Fed. Reg. at 24,710 (1976 Final Rule).

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[3] As required by the district court in *Train*, the EPA proposed and promulgated new regulations while the appeal was pending. *See* 41 Fed. Reg. at 6281 (explaining that the EPA is proceeding with the appeal but promulgating rule to remain in compliance with district court order).

The EPA has admitted at various times that the Silvicultural Rule identifies only a subset of silvicultural activities that constitute point sources under the statute. Indeed, at various points in the regulatory history of the Silvicultural Rule, the EPA proposed to regulate a broader range of silvicultural point sources. *See, e.g.*, 64 Fed. Reg. 46,057, 46,077 (Aug. 23, 1999) (proposing to expand category of silvicultural point sources that would be regulated); 43 Fed. Reg. 37,078 (Aug. 21, 1978) (proposing to regulate additional silvicultural point sources on a case-by-case basis).

Nevertheless, the Forest Service relied on the Silvicultural Rule in a case a decade ago to argue that the four listed activities in the Silvicultural Rule are the *only* types of silvicultural activities that require a permit. In *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), the question before the court was whether the Forest Service was required to obtain an NPDES permit for its annual aerial insecticide spraying over 628,000 acres of national forest land in Washington and Oregon. The Ninth Circuit rejected the argument that such activity was excluded, reiterating that "the EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of point source by 'defining' it as a non-point source." *Id.* at 1190. Consistent with *Train* and *Costle*, and in order to ensure that the Silvicultural Rule comports with statutory requirements, the court in *Forsgren* read the four point source activities listed in the Silvicultural Rule as nonexclusive. The *Forsgren* decision

is consistent with the EPA's own recognition that the Silvicultural Rule does not actually identify all silvicultural point sources.[4] Recognizing the statutory mandates to regulate all point sources, however, *Forsgren* makes clear that the point sources left unidentified by the Silvicultural Rule must still obtain a permit. *See also United States v. Earth Sciences Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (holding that agricultural and silvicultural activities, construction activity, and mining activities are not exempt from the Clean Water Act; such activities "may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation"); *cf. United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973) (concluding that the Rivers and Harbors Act of 1899 requires a permit to discharge and explaining that the agency's failure to set up a permitting program did not alleviate the discharger from the Act's prohibitions).

In this case, the EPA insists again that the Silvicultural Rule allows it to exempt point source silvicultural activities from regulation under the Clean

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[4] As recently as 2000, the EPA acknowledged that the Silvicultural Rule does not regulate all point sources within the meaning of the Clean Water Act. *See* 65 Fed. Reg. 43,586, 43,650 (July 13, 2000) (Final Rule) (explaining that the 1999 proposal would have "provided all NPDES permitting authorities with sufficient authority to regulate 'physical' point source discharges from silvicultural sources not already subject to NPDES permit requirements."). The EPA ultimately decided against expanding the scope of the Silvicultural Rule. 65 Fed. Reg. at 43,650.

Water Act. Since 1975, however, courts have repeatedly told the EPA that the plain language of the Act dictates otherwise.

B. The EPA's Interpretation of the Silvicultural Rule Would Contradict Legislative Control that Congress Has Exercised in the Area of Point Source Exemptions to Regulation.

Against the backdrop of the EPA's attempt in 1973 to create regulatory exclusions for silvicultural point sources it is helpful to recall that where Congress has intended exclusions, it has provided them. Irrigated agriculture provides a good example of Congress's stingy attitude toward point source exemptions. At the time that Congress enacted the Clean Water Act in 1972, Congress was well aware that discharges from irrigated agriculture would fall within the broad definition of point source. *See* 118 Cong. Rec. 10,765 (Mar. 29, 1972). Though some members of Congress supported an amendment that would exempt irrigated agriculture from the NPDES program, Congress rejected that amendment in keeping with its intent to read point source broadly. *See* 118 Cong. Rec. 10,765 (Mar. 29, 1972).

In 1977, however, Congress alleviated the EPA's burden of issuing permits for every agricultural point source by adopting a statutory exemption for return flows from irrigated agriculture. 33 U.S.C. § 1342(l)(1). Congress's actions in 1977 are notable for

three reasons. First, Congress amended the statute where it intended a narrower application of "point source." Second, Congress continued to be stingy with exemptions from the NPDES program. To that end, it did not exempt all agricultural point sources – it limited the exemption to return flows from irrigated agriculture. Third, Congress did not grant a similar statutory exemption to silvicultural activities.

Like irrigated agriculture, stormwater discharge is another area in which Congress originally anticipated regulation under the NPDES program but eventually made revisions to accommodate tougher realities. In 1987, Congress enacted amendments to the Clean Water Act specifically to address stormwater regulation. Pub. L. No. 100-4, 101 Stat. (1987).

The 1987 Amendments were a mixed bag in terms of Congress's traditionally hard line on regulating point sources. On the one hand, Congress alleviated administrative burdens for some categories of stormwater dischargers that fell outside primary areas of concern. *See* 131 Cong. Rec. 19,846, 19,850 (July 22, 1985) (statement of Rep. Rowland); 131 Cong. Rec. 15,616, 15,657 (June 13, 1985) (statement of Sen. Wallop). For these categories, Congress would give the EPA greater time and latitude for addressing stormwater discharge. *See* 33 U.S.C. § 1342(p)(1) (putting moratorium on permit program for Phase II discharges). At the same time, however, even for these categories of lesser concern, Congress set firm deadlines so that the ultimate job would get done. *See* 33 U.S.C. § 1342(p)(5) (requiring the EPA to study the

nature and extent of Phase II discharges and submit a report to Congress); § 1342(p)(6) (setting deadline for the EPA to publish regulations on how to address Phase II stormwater discharges).

On the other hand, for categories of concern, the 1987 amendments signaled a wake-up call to the EPA. Congressional reports leading up to the 1987 amendments underscore Congress's disappointment with the EPA for failing to regulate stormwater discharges under the 1972 Act. *See*, *e.g.*, 132 Cong. Rec. 32,380, 32,400 (Oct. 16, 1986) (Sen. Stafford, Chairman of Committee on Environment and Public Works) ("EPA should have developed this stormwater program long ago. Unfortunately, it did not.").

One of the key areas of concern for Congress was stormwater discharge associated with industrial activities.[5] *See* 33 U.S.C. § 1342(p)(2)(B) (stating that the moratorium on permitting shall not apply to a "discharge associated with an industrial activity"). For industrial dischargers and other Phase I categories, Congress left the EPA no discretion over whether to require permits and placed the EPA on a strict compliance schedule to issue regulations and permits

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[5] Other categories of concern, collectively referred to as Phase I categories, included stormwater discharges that were already subject to NPDES permitting, municipal discharges of stormwater, and stormwater discharges that the EPA determines on a case-by-case basis to be a significant contributor of pollutants. *See* 33 U.S.C. § 1342(p).

covering these categories of discharges. *See* 33 U.S.C. § 1342(p)(4)(A) (setting forth detailed deadlines).

As with the broader program for regulating point source discharges, in the area of stormwater regulation, when Congress meant to give wholesale exemptions to particular industries, Congress did so explicitly. To that end, the 1987 amendments specifically exempt from regulation "stormwater runoff from oil, gas, and mining operations." 33 U.S.C. § 1342(l)(2).

Even though the EPA has attempted to narrow its regulation of silvicultural activities, neither the 1977 nor the 1987 amendments to the Clean Water Act provided any ratification of the agency's silvicultural exclusions. Congress has never seen fit to exempt silvicultural point source from the NPDES program. To the extent that the EPA's interpretations of the Silvicultural Rule and Phase I rule would render a different outcome, the Court should reject those interpretations as contrary to the legislative structure and control that Congress has exercised in this area.

C. The EPA's Proffered Interpretations of the Silvicultural Rule Have Been Rejected Throughout the Rule's Regulatory History.

Despite years of rebukes and rejections of its interpretation, and despite prior statements that are

inconsistent with its interpretation,[6] the EPA once again advances an interpretation of the Silvicultural Rule that would create regulatory exclusions for point source discharges. Here, the EPA insists that the Silvicultural Rule means that "logging roads are not silvicultural point sources, even if the runoff from logging roads flows through a ditch, channel, or culvert before being released into waters of the United States." *See* U.S. Br. at 4.

The EPA makes two principal arguments in support of its position. First, the EPA argues that logging road runoff is not a point source because it falls outside of the four point sources enumerated in the Silvicultural Rule's definition of "silvicultural point sources." *See* U.S. Br. at 12. More specifically, the EPA's interpretation of the Phase I rule relies on the EPA's narrow construction of the Silvicultural Rule. *Id.* at 12 (noting that, with regard to the Phase I regulation's reference to the Silvicultural Rule, "EPA has construed that reference, however, as encompassing only discharges from the four subcategories of silvicultural facilities it had already identified as point sources in the Silvicultural Rule, which do not

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[6] In 1990, the EPA published a notice regulatory interpretation explaining that "[d]ischarges which involved the intentional collection of contaminated runoff and its subsequent release from a discrete and identified point, on the other hand, were to be classified as a point source discharge subject to the NPDES program." 55 Fed. Reg. 20,521 (May 17, 1990). The EPA's position here – that collection of runoff is immaterial to the ultimate characterization of runoff as a point source – is directly contrary.

include runoff from logging roads"). Whether through its direct interpretation of the Silvicultural Rule or by virtue of its importation of the Silvicultural Rule into the Phase I rule, the EPA's attempt to limit the scope of regulation to four silvicultural point sources is of little consequence. The EPA's argument is one that has been squarely rejected.

Consistent with *Costle* and *Train*, *Forsgren* held that the EPA must regulate all point sources; it cannot create exemptions through regulation. As a result, the only basis upon which the EPA can argue that logging road runoff is not a point source is by applying the statutory definition supplied by Congress. Contrary approaches – namely attempts to exclude logging road runoff without considering the statutory definition of point source – have been routinely rejected and therefore are not entitled to deference on that basis.

The EPA's second argument focuses not on the Silvicultural Rule's identification of point sources, but on its inclusion of nonpoint source counterexamples. In particular, the current version of the Silvicultural Rule states:

> The term ["silvicultural point source"] does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction

> and maintenance from which there is natural runoff.

40 C.F.R. § 122.27 (2012). In this litigation, the EPA argues for the first time that all stormwater runoff from logging roads is "natural runoff," regardless of whether it is collected and discharged through discrete channels. *See* U.S. Br. at 12-13.

There are at least two problems with the EPA's interpretation of "natural runoff" in this case. Each of the problems undermines the legitimacy of deferring to the EPA.

First, the EPA's interpretation of "natural runoff" would exclude point sources from the NPDES program by lumping all types of runoff under the heading of nonpoint source pollution. To the extent that the EPA seeks to avoid regulating certain categories of silvicultural activities simply by excluding them or redefining them as nonpoint sources, that effort has been rejected by courts for nearly four decades.

Second, the EPA has argued that natural runoff includes "all precipitation-driven runoff from logging roads." *See* U.S. Br. at 4, 8. This claim cannot be squared with the 1987 Clean Water Act Amendments. In particular, if precipitation were the touchstone for determining whether runoff is a nonpoint source, then *all* stormwater would be nonpoint sources. After all, stormwater discharges are by definition triggered by precipitation events. The very fact that Congress requires stormwater regulation under the NPDES

program – a program aimed at point source regulation – means that not all stormwater discharges are nonpoint in nature. Indeed, Congress enacted the 1987 Amendments precisely because the EPA had not been regulating stormwater discharges as point sources as Congress had originally intended.

In sum, the EPA's interpretation of the Silvicultural Rule manifests a categorical reluctance to regulate stormwater runoff that is collected in ditches along logging roads. That interpretation is not only contrary to the statutory language but it is squarely at odds with the several rebukes of its cramped reading of the Clean Water Act. It is also at odds with the clear purpose of the 1987 Amendments. As such, the EPA's interpretation is not entitled to deference from this court.

III. *AUER* DEFERENCE RAISES THE RISK OF ARBITRARINESS WHEN AN AGENCY INTERPRETATION FAILS TO AFFORD THE REQUISITE FAIR NOTICE.

In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012), this Court warned of the risk that "agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." The Government's arguments in this case implicate the Court's concerns regarding open-ended and imprecise regulations. The EPA's core contention is that the Silvicultural Rule is imprecise in its current form, U.S. Br. at 28-29, allowing the EPA to make ad

hoc determinations regarding what constitutes a silvicultural point source. The EPA implicitly argues the same thing with respect to its Phase I regulations, asserting that the text of its regulations "might not" foreclose respondent's claim. U.S. Br. at 26.

Respondent argues that the EPA's positions are plainly inconsistent with its regulations. But even if the EPA were correct that the regulations are ambiguous, deferring to the EPA's interpretations increases the risk of arbitrariness.

Put slightly different, the problem here is that the EPA is attempting to inject ambiguity into regulations that are clear. As a result, the EPA's efforts now implicate underlying notions of notice and fairness. This Court should be dubious about the EPA's contentions particularly when it is asked (1) to defer to interpretations of imprecise regulations when the agency has had an opportunity to clarify the imprecision but has chosen not to do so and (2) to accept agency interpretations that unnecessarily inject ambiguity into the regulations and make them imprecise.

A. Deferring to the EPA's Interpretation of the Silvicultural Rule Would Allow the Agency To Create De Facto New Regulations Through Litigation.

The regulatory history of the Silvicultural Rule makes clear that the EPA is not simply advancing an

argument in this case that has been rejected since the passage of the Clean Water Act. The regulatory history also highlights that the EPA created a gap where Congress did not sanction it to do so. The EPA then did nothing to fill the gap even when *Forsgren* and others told the agency that the Silvicultural Rule was incomplete and would not shield additional point sources from being required to obtain permits under the statute. In other words, a long history of rebukes by the court made the EPA well aware that it could not rewrite statutory mandates. And yet, the EPA chose to instead claim that its regulation was ambiguous and that it should now get deference for its interpretation in the litigation process.

Under those circumstances, where an agency has been told by several courts that its regulations do not cover all that the statute covers, but the agency nonetheless chooses to leave gap-filling to the interpretive process, deferring to agency interpretations under *Auer* would be inappropriate because it creates perverse incentives to leave inadequate regulations unaltered.

B. The Phase I Rule Would be Rendered Imprecise If the Court Were to Accept the EPA's Interpretation.

If this Court were to defer to the EPA's interpretation of the Phase I rule, the regulation would be rendered imprecise and separation of powers concerns

would arise. To be sure, the Phase I rule is not imprecise on its face. The Phase I regulations set out to identify the categories of industry whose stormwater discharges will be subject to the NPDES program. To aid in that identification, the EPA uses SIC Codes. 40 C.F.R. § 122.26(b)(14)(ii) (2012). The SIC Codes are meant to lend precision to the regulation. 55 Fed. Reg. 47,990, 48,010 (Nov. 16, 1990). By reference to SIC Codes, the EPA has included logging within the categories of industry whose stormwater discharge will be subject to regulation. 40 C.F.R. § 122.26(b)(14)(ii) (including industries falling within SIC 24, which includes logging).

Notably, the text of the Rule supplements the SIC Codes to include additional facilities or activities that the EPA has deemed important sources of stormwater discharge. To that end, the EPA deems the scope of industrial activities to include immediate access roads. 40 C.F.R. § 122.26(b)(14)(ii). In the Federal Register preamble, the EPA describes immediate access roads to include "haul roads." The EPA then clarified that "haul roads (roads dedicated to the transportation of industrial products) and similar extensions are required to be addressed in permit applications." 55 Fed. Reg. at 48,009.

In this case, the EPA seeks to refine its otherwise clear inclusion of logging as an industrial activity. To that end, the EPA argues that, while logging is an industrial activity, timber hauling and access for big

machines necessary to log (both indispensable parts of logging) are not industrial activities.[7] The Government explains this by saying that the EPA "intended" in the Phase I rule to refer to only certain silvicultural activities, notwithstanding its statement without qualification in the rule that SIC 24 – which includes logging – is covered. *See* U.S. Br. at 25. In other words, the EPA is asking this Court for deference on the ground that it "intended" its regulations to say something that the regulations do not.

In order to accept the EPA's spontaneous carve-out of timber access and hauling from the ambit of "logging," the Court would have to read imprecision into the Phase I rule. Namely, the Court would have to accept the premise that the SIC Codes are only a first approximation or ballpark estimate of the specific industrial processes that will actually be regulated. To that end, the Court would have to accept that the EPA is entitled to make more nuanced determinations in the course of litigation, rather than in the form of regulatory text, of which processes associated with any given industry referenced by the SIC Codes are meant to be regulated by the Phase I rule. In this way, the agency's proffered interpretation would create significant latitude for the agency to decide on an ad hoc basis that which the regulation purports to do on

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[7] Notably, two of the point source silvicultural activities identified by the Silvicultural Rule – rock crushing and gravel washing – are processes directly associated with the construction of roads to be used for timber hauling.

its face – namely to identify industrial activities whose stormwater discharges are subject to the NPDES program. That process of identifying industrial activities is precisely the task Congress required the EPA to perform through notice and comment rulemaking. 33 U.S.C. § 1342(p).

Here, the regulation of stormwater discharge from silvicultural activities was not an unfamiliar topic to the EPA. It had been struggling with statutory compliance in the area for many years. If, under those circumstances, the EPA had wanted to exclude stormwater runoff from timber hauling – despite its inclusion of logging within the definition of industrial activity and despite its inclusion of haul roads within the ambit of industrial facilities – the EPA certainly bore the responsibility for doing so in the plain language of the regulation.

The agency's duty to provide clarity is in no way met by its reference to part 122 exclusions in the Phase I rule. Part 122 generally encompasses the EPA regulations covering the NPDES program. Regulations in part 122, therefore, include provisions like 40 C.F.R. § 122.3 that reiterate a variety of exemptions otherwise provided by Congress, such as return flows from irrigated agriculture or nonpoint sources. Reminding industries that the exclusions set forth in part 122 would be undisturbed by the Phase I rule merely confirms that the Phase I program does not mean to upset otherwise legitimate congressional exemptions to the NPDES program.

To the extent the EPA urges that the Phase I rule's reference to part 122 was intended to import previously rejected attempts by the EPA to regulate only some silvicultural point sources, that argument is unavailing. It would allow the EPA to accomplish through the back door what courts have long held it cannot do directly.

Deferring to the EPA's interpretation in this case would inject otherwise unambiguous regulations with imprecision. Moreover, deference would encourage the agency to adopt regulations that amount to little more than close-enough approximation, knowing that the details could be sorted out through litigation and that the court would defer to the agency's decisions under the guise of deferring to interpretations. If agencies are permitted to leave these details to case-by-case determinations, agencies could create de facto new regulation through litigation without ever providing adequate notice of those expectations prior to the litigation. *Auer* deference is therefore not warranted.

IV. *SKIDMORE* DEFERENCE IS ALSO NOT WARRANTED.

As in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), if *Auer* deference is not warranted, this Court must determine whether *Skidmore* deference is appropriate. For this, the Court will accord the "interpretation a measure of deference proportional to the '"'thoroughness evident in its consideration, the validity of its reasoning, its consistency

with earlier and later pronouncements, and all those factors which give it power to persuade.'"'" *Id.* at 2169 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

It is clear that no deference should be accorded to the EPA's interpretation under *Skidmore*. First, the EPA's interpretation is unpersuasive in that, as Respondent makes clear, it "is flatly inconsistent with" the Clean Water Act. *SmithKline*, 132 S. Ct. at 2169. It also "plainly lacks the hallmarks of thorough consideration" because, among other things, the United States announced its interpretation for the first time in an amicus brief in this litigation. *Id.* Finally, as courts since 1975 have concluded in their rebukes of the EPA's prior attempts to exempt silvicultural sources from the NPDES program, the EPA's reasoning is "wholly unpersuasive." *Id.* at 2170. As such, the EPA's interpretation warrants no deference under *Skidmore*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR AMICI CURIAE LAW PROFESSORS ON SECTION 1369(b) JURISDICTION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors of environmental and administrative law. *Amici* have a long-standing interest in the proper interpretation of environmental statutes, such as the Clean Water Act ("CWA"). In particular, *Amici* have an interest in ensuring the correct interpretation of the CWA's judicial review and preclusion provision, 33 U.S.C. § 1369(b).

Collectively, *Amici* have spent decades interpreting and teaching the CWA, as well as the other administrative law and statutory interpretation principles at issue in this case. *Amici* believe that many courts have improperly expanded Section 1369(b) beyond its text, and in doing so have created considerable divergence in the case law and confusion for practitioners, conservation organizations, and regulated entities. *Amici* believe the Petitioners' arguments here threaten to further expand the reach of Section 1369(b) well beyond what the statute's text supports, and in contravention of this Court's CWA precedent, as well as jurisprudence regarding as-applied challenges to agency rules and traditional notions of ripeness. At best, *Amici* believe

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[1] In accordance with S. Ct. Rule 37.3(a), all parties have consented to the filing of this brief. All Petitioners and Respondent have done so by filing consent letters directly with the Clerk. Pursuant to S. Ct. Rule 37.6, Counsel for *Amici* states that no counsel for a party authored this brief in whole or in part and no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Petitioners' and the United States' arguments here risk creating even more confusion and tortured procedure for judicial review under one of the nation's most important environmental statutes. The purpose of this submission is to offer support for an interpretation of Section 1369(b) that stays true to the statute's text and avoids the aforementioned problems. A further description of *Amici* is set forth in the Appendix to this brief.

SUMMARY OF THE ARGUMENT

Respondent in this case brought a citizen suit under the CWA based on a simple theory of liability: Petitioners were discharging polluted sediment from point sources into waters of the United States without a National Pollutant Discharge Elimination System ("NPDES") permit, in violation of the statutory prohibition in 33 U.S.C. § 1311(a). This bedrock theory of CWA liability has formed the basis of innumerable citizen enforcement actions for decades. Such an enforcement action is properly brought, as the Respondent did here, in the district court pursuant to 33 U.S.C. § 1365.

Now, having lost in the court of appeals, Petitioners ask this Court to rule that the district court never had jurisdiction in the first place. They argue that Respondent effectively challenged, or the court of appeals effectively invalidated, the U.S. Environmental Protection Agency's ("EPA") rules pertaining to stormwater runoff from certain logging-

related activities. More specifically, they take issue with the Ninth Circuit's conclusion that an NPDES permit is required for pollution from logging roads that is channeled through man-made conveyances because such pollution is not "natural runoff" within the meaning of EPA's "Silvicultural Rule." The Ninth Circuit arrived at this conclusion by both relying on statutory provisions and disagreeing with EPA's interpretation of the regulations at issue. In doing so, Petitioners assert that the Ninth Circuit "implicitly invalidated" the rules. Such a step, according to Petitioners, runs afoul of the limitations set forth in 33 U.S.C. § 1369(b)(2).

But this leap to the preclusion provision of Section 1369(b) is too great for Petitioners' arguments to land intact. The Ninth Circuit's ruling did not run afoul of CWA Section 1369(b) because that provision is simply inapplicable here. For Section 1369(b)(2) to pose any limit on a court's power to interpret or review the validity of a rule, the rule must have been one of the EPA actions directly reviewable exclusively in the courts of appeals under Section 1369(b)(1). As discussed in detail herein, the EPA actions at issue in this case—whether one refers to EPA's Silvicultural Rule, EPA's interpretation of the term "natural runoff" in the Silvicultural Rule, EPA's Phase I stormwater rules, or any other EPA action exempting logging roads from the NPDES program—do not fall within Section 1369(b)(1)'s limited and precise list of actions.

Petitioners make remarkably broad statements regarding the reach of Section 1369(b), suggesting that it requires challenges to all EPA CWA rules be

filed in the courts of appeals. This assertion finds no support in the statute, nor in this Court's rulings in *E. I. du Pont de Nemours & Co. v. Train* ("*E.I. du Pont*"), 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle* ("*Crown Simpson*"), 445 U.S. 193 (1980). While many courts have correctly recognized just how narrow *E.I. du Pont* and *Crown Simpson* are, some courts have gotten side-tracked by one quote from *E.I. du Pont*, in particular, taken out of context. Some case law has then developed around this misstep, with cases relying on each other, often offering little additional analysis, and straying farther from the text of Section 1369. EPA too strayed off course at some point and departed from its early position that "review is not provided for actions in issuing general regulations governing the issuance of NPDES permits," 44 Fed. Reg. 32,854, 32,855 (June 7, 1979), to arrive at its current position that Section 1369 applies to all "NPDES regulations," U.S. Br. 16. Somewhere in all of this, the plain language of the statute has gotten lost.

Petitioners' arguments here threaten to send this runaway evolution of a limited statutory provision off a cliff. Petitioners' arguments pose problems for traditional principles of administrative law and a court's ability to interpret rules, just as this Court has done numerous times under the CWA. What is more, their arguments have untenable practical implications, including opening the courts of appeals to hypothetical challenges to EPA actions unhinged from any facts, or inviting unreviewable *post hoc* agency interpretations of rules. This cannot be what Congress intended.

To be sure, this Court can readily conclude that the regulations at issue are unambiguous or that the Ninth Circuit permissibly interpreted the regulations to bring them in line with the CWA, without reaching any of Petitioners' arguments regarding CWA Section 1369. *See Envtl. Def. v. Duke Energy Corp. ("Duke Energy")*, 549 U.S. 561, 573 (2007); NEDC Br. 19. But if this Court engages in a "jurisdictional" analysis, it should reject Petitioners' invitation to extend Section 1369(b) beyond its textual reach.

ARGUMENT

Section 1369(b)'s text leaves no room for Petitioners' arguments that the district court lacked jurisdiction. The statute plainly does not require that challenges to EPA rules exempting discharges from the NPDES program be brought directly in the courts of appeals.[2] This Court's holdings on Section 1369 are likewise limited. For these reasons, and in light of the troubling implications of an expansive reading of Section 1369(b), Petitioners' arguments should be rejected.

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[2] *Amici* do not endorse the view that EPA promulgated a regulation, or that Respondent challenged such regulation, exempting the relevant discharges from the NPDES program. This brief simply accepts these premises for purposes of arguing that Section 1369(b) does not apply in any event.

I. SECTION 1369(b)(1) DOES NOT APPLY TO THE RULES UNDERLYING THIS CASE

CWA Section 1369(b)(1) is inapplicable to an EPA rule exempting discharges from the NPDES program. Congress expressly enumerated seven EPA Administrator actions[3] subject to Section 1369(b)(1). Section 1369(b)(1) provides for review in the courts of appeals of EPA actions:

> (A) in promulgating any standard of performance under section 1316 of this title,
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311,

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[3] Hereafter, we refer to both the EPA Administrator and to the agency itself as "EPA."

> 1312, 1316, or 1345 of this title,
> (F) in issuing or denying any permit under section 1342 of this title, and
> (G) in promulgating any individual control strategy under section 1304(l) of this title . . . .

33 U.S.C. §§ 1369(b)(1)(A)–(G) (2006).

Section 1369(b)(1)'s precision demonstrates that Congress intended Section 1369 to apply *only* to the EPA actions listed therein. As the Second Circuit noted, "the complexity and specificity of [Section 1369](b) in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable." *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976).

Yet in clear contravention of Congressional intent to limit the applicability of Section 1369(b)(1), Petitioners ask this Court to broadly interpret the provision to cover *every* NPDES regulation promulgated by EPA, including regulations exempting discharges from the NPDES program. State Br. 13; Industry Br. 51. Petitioners even go so far as to assert that the courts of appeals must directly hear challenges to the validity of *all* EPA-promulgated CWA regulations. State Br. 32; Industry Br. 52.[4] The text, context, and this Court's

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[4] *See also* Br. for Amicus Curiae Chamber of Commerce of the United States of America in Support of Pet'rs ("Chamber

precedent demonstrate that Section 1369(b)'s coverage extends nowhere near that far and, in any event, does not apply here.

A. The CWA's Grant of Direct Judicial Review to the Courts of Appeals is Limited

Congress listed seven specific EPA actions subject to Section 1369. The statutory text offers no indication that Congress intended the scope of Section 1369 to extend beyond the explicitly listed actions. *See, e.g., Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 188 (1978) (applying the maxim *expressio unius est exclusio alterius* to conclude that Congress did not intend to exempt any "hardship cases" from the Endangered Species Act beyond those expressly listed in the statute). Thus, Congress intended to *exclude* EPA actions not specifically listed in Section 1369. Congress could have included in the CWA a "catch-all" provision for "any other final action of the Administrator," as it did in a similar judicial review provision in the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1), but it did not.[5] Congress's decision not to

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Br.") 3 ("Section 1369(b) provides for review of the lawfulness of EPA's rules"); Br. for Amici Curiae of the States of Arkansas, et al., in Support of the Pet'rs 4 ("Congress allowed judicial review of EPA rules under the CWA when it provided that '[a]ny interested person' may seek review of an EPA action in approving or promulgating any effluent limitation or other limitation.").

[5] The differences between the CAA and the CWA in this regard are particularly important, given all parties' discussions

include such a "catch-all" provision further demonstrates that it intended for the courts of appeals to have direct review over only the actions listed in Section 1369(b)(1).[6]

Recognizing Congress's intent to limit Section 1369(b)(1) to the actions expressly enumerated in the statute, many courts of appeals have correctly interpreted the provision by staying true to its text. *See Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003) ("We agree with our sister circuits [the 2nd, 5th, 8th, 9th, and 11th Circuits]: original jurisdiction over EPA actions not expressly listed in [S]ection 1369(b)(1) lies not with us, but with the district court."); *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005) ("[S]ince some but not all of the actions that the EPA can take under the CWA are listed with considerable specificity in [S]ection 1369(b), not all EPA actions taken under the CWA are directly reviewable in the courts of appeals.").[7] So

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of this Court's decision in *Duke Energy*. This Court's concern about carefully walking the line between interpretation and invalidation of an EPA regulation was particularly acute in *Duke Energy*, in light of the CAA's sweeping counterpart to CWA Section 1369.

[6] A similar judicial review provision in the Resource Conservation and Recovery Act ("RCRA") also does not include a "catch-all" provision. Courts have interpreted the RCRA provision to include only the actions expressly listed in the statute. *See, e.g., Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996).

[7] *See also Bethlehem Steel Corp.*, 528 F.2d at 517 ("[T]he complexity and specificity of [S]ection 1369(b) in identifying

too should the analysis here start from the premise that *only those EPA actions precisely listed in the 1369(b)(1)* are subject to that provision's limitations on judicial review.

B. A Rule Exempting Discharges from the NPDES Program is Not an "Effluent Limitation or Other Limitation" or the

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what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable. If Congress had so intended, it could have simply provided that all EPA actions under the statute would be subject to review in the courts of appeals, rather than specifying particular actions and leaving out others."); *Am. Iron and Steel Inst. v. EPA*, 543 F.2d 521, 528 (3d Cir. 1976) (referring to Section 1369(b)(1)(E) and (F) as "explicit and limited provisions"); *Appalachian Energy Group v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994) (rejecting original jurisdiction over EPA internal memo in part because Section 1369(b)(1) limits its jurisdiction to "specified actions of the EPA administrator"); *City of Baton Rouge v. EPA*, 620 F.2d 478, 480 (5th Cir. 1976) ("[T]he rule is clear: the Courts of Appeals have jurisdiction for direct review only of those EPA actions specifically enumerated" in Section 1369); *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1219, 1222 (6th Cir. 1992) ("Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the [CWA]." (quoting *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)); *Arkansas Poultry Fed'n v. EPA*, 852 F.2d 324, 325 (8th Cir. 1988) (noting that courts of appeals' original jurisdiction under Section 1369(b)(1)(C) is limited); *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 642 (11th Cir. 1990) (stating that Section 1369 provides for "direct review in a circuit court of appeals of specific administrative actions under the statute").

"Issuance or Denial of a Permit"

Under the plain language of the statute Petitioners' arguments must fail. A rule exempting discharges from the NPDES program is not an "effluent limitation or other limitation" within the meaning of Section 1369(b)(1)(E); nor is it "the issuance or denial of a permit" under Section 1369(b)(1)(F).[8]

1. *Section 1369(b)(1)(E).* A rule exempting discharges from the NPDES program is plainly not an action "approving or promulgating any effluent limitation or other limitation under Section 1311, 1312, 1316, or 1345" of the CWA. 33 U.S.C. § 1369(b)(1)(E). As underscored by the maxim *expressio unius est exclusio alterius,* this Court should interpret Section 1369(b)(1)(E) to apply only to EPA actions taken pursuant to the CWA sections specifically listed therein. The Silvicultural Rule, for example, was not promulgated under any of the CWA sections listed in Section 1369(b)(1)(E); the Federal Register notice of proposed rules for the 1976 version of the Silvicultural Rule notes that the authority for this rule comes from Sections 1314, 1342, and 1361. 41 Fed. Reg. 6,281, 6,283 (Feb. 12, 1976). These statutory provisions are not included within Section 1369(b)(1)(E). Thus, the Silvicultural Rule is not an "effluent limitation or other limitation" for the

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[8] Petitioners contend that only Sections 1369(b)(1)(E) or (F) apply here. Thus Amici will not discuss Sections 1369(b)(1)(A)–(D) or (G).

purposes of Section 1369. *See Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312–13 (9th Cir. 1992) (applying *expressio unius est exclusio alterius* to Section 1369(b)(1)(E) and noting that "[n]o sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated"); *see also Our Children's Earth Found. v. EPA*, 527 F.3d 842, 847 (9th Cir. 2008) (finding Section 1369(b)(1)(E) inapplicable to a challenge to EPAs failure to review effluent guidelines in part because Section 1314(b) is not listed in Section 1369).

Moreover, Congress provided a precise meaning of "effluent limitation" in the CWA, which does not encompass a rule exempting discharges from the NPDES program. Congress defined "effluent limitation" to mean "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . ." 33 U.S.C. § 1362(11) (2006). Congress then authorized EPA to approve or promulgate effluent limitations under several different CWA sections, including Sections 1311(b)(1) and (b)(2)(A) (requiring effluent limitations for existing sources that apply the best practicable control technology ("BPT") by 1977 and best available technology ("BAT") economically achievable by 1989), and Section 1316 (requiring EPA to promulgate new source performance standards applicable to point sources constructed after October 1972). EPA has promulgated scores of such effluent

limitations for myriad industry categories and types of pollutants.[9] Even a quick glance at some EPA actions under these sections confirms that, as one court explained, "[a]s a rule of thumb, effluent limitations dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst. v. EPA*, 890 F.2d 869, 876–77 (7th Cir. 1989) (citations omitted). Rules exempting discharges from the NPDES program do not restrict the "quantities, rates, and concentrations" of pollutants, 33 U.S.C. § 1362(11), and they in no way speak in "technical terms" regarding the "amount of each pollutant" a source may discharge. *Am. Paper Inst.*, 890 F.2d at 876–77. Instead, such regulations *exempt* potential dischargers from any limitations that EPA might otherwise impose through the NPDES program.

A rule exempting discharges from the NPDES requirements is also not an "other limitation" within the meaning of Section 1369(b)(1)(E). As this Court has guided, "where general words follow specific

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[9] *See, e.g.*, 40 C.F.R. § 410.22(a) (2012) (describing BPT effluent limitations for a "pollutant or pollutant property" for wool finishing point sources in terms of pounds per 1,000 pounds of fiber); 40 C.F.R. § 440.43(a) (2012) (describing BAT effluent limitation for "pollutants discharged in mine drainage from mines . . . that produce mercury ores" in terms of milligrams per liter); 40 C.F.R. § 420.14(a)(2) (2012) (describing the new source performance standards for "regulated parameters" such as cyanide and naphthalene resulting from by-product cokemaking in terms of pounds per thousand pounds of product).

words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (applying the maxim *ejusdem generis* to find that the phrase "any other class of workers engaged in . . . commerce" should "be controlled and defined by reference to the [specific classes of workers] recited just before" the phrase) (citations omitted). As the general term "other limitation" follows the more specific term "effluent limitation," other limitation should be understood to mean a limitation akin to an effluent limitation. The Seventh Circuit in *American Paper Institute v. EPA* correctly rejected a broad interpretation of "other limitation" because it "would in effect allow the term 'other limitation' to swallow up distinctions that Congress made between effluent limitations and other types of EPA regulations." 890 F.2d at 876–77.

Moreover, a regulation covered under section 1369(b)(1)(E) must be a *limitation*, regardless of whether it is an "effluent limitation" or an "other limitation." *See Natural Res. Def. Counsel, Inc. v. EPA*, 656 F.2d 768, 775–76 (D.C. Cir. 1981) (finding a regulation to be an "effluent limitation or other limitation" in part because "in practice [the regulations] limit the discharge of sewage"); *see also Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) (construing "limitation" to mean "a restriction on the untrammeled discretion of the industry which was the condition prior to the passage of the statute").

Regulations exempting discharges from the

NPDES program "provide no limitation[] whatsoever" on regulated industries. *Nw. Envtl. Advocates v. EPA ("NWEA")*, 537 F.3d 1006, 1016 (9th Cir. 2008). Nor do they guide or place any restrictions on permit issuers setting the limitations applied to point sources. Thus, these regulations are more akin to those regulations at issue in *American Iron and Steel Institute v. EPA*, where the Third Circuit found that regulations which "do no more than prescribe the policy and procedures to be followed in connection with applications for permits" and "neither prescribe specific number limitations for any pollutant, nor . . . list the factors which must be considered in determining the control measures which individual point sources must employ" were not "effluent limitation[s] or other limitation[s]" under Section 1369. 543 F.2d at 526–27; *see also NWEA*, 537 F.3d at 1016 (noting that EPA's regulation exempting a discharge from the NPDES program could be considered an EPA action "'approving or promulgating any effluent limitation or other limitation' only if those words are understood in a Pickwickian sense"). Here too, EPA's underlying regulations are not effluent limitations or other limitations within the plain meaning of the statute.

2. *Section 1369(b)(1)(F).* Likewise, the text of Section 1369(b)(1)(F) does not include EPA's action exempting discharges from the NPDES program. Section 1369(b)(1)(F) grants the courts of appeals direct review over EPA's action "in issuing or denying any permit under Section 1342" of the CWA. 33 U.S.C. § 1369(b)(1)(F). This provision is plainly about the issuance or denial of a particular NPDES

permit. *See, e.g., Cntl. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 557 (2d Cir. 1978) (finding that Section 1369(b)(1)(F) is limited "to a direct challenge to the merits of a decision to 'issue or deny' a NPDES permit"); *Arkansas v. Oklahoma*, 503 U.S. 91, 97 (1992) (assuming without discussion that the court of appeals had original jurisdiction to review EPA's issuance of an NPDES permit). Other provisions within Section 1342 (governing the NPDES permit program) make clear that Congress understood that the regulations fleshing out the stormwater permitting requirements were distinct from the act of issuing or denying any particular permit application. *See* 33 U.S.C. § 1342(p)(4)(A) (2006); *see also* NEDC Br. 25.

EPA's *promulgation of a rule* exempting a category of discharges from the NPDES program can hardly be considered the *issuance or denial* of a particular NPDES permit. This is so even if those words are given a more effects-based gloss. The effect of an exemption from the NPDES program is that dischargers may continue discharging without restriction and without fear of liability under the CWA. EPA's denial of an NPDES permit, on the other hand, means that the denied applicant must stop discharging, or continue discharging without a permit and face CWA civil, and even criminal, liability. *See NWEA*, 537 F.3d at 1018 (finding that permanent exemptions from the NPDES program are not even "functionally similar" to the issuance or denial of an NPDES permit); *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co. ("EPIC")*, 266 F. Supp. 2d 1101, 1113 (N.D. Cal. 2003) (noting that the effect of an

exemption from the NPDES program "is to exclude sources from the NPDES program, whereas the issuance or denial of a permit, as a matter of statutory mandate, only occurs when there are point sources regulated by the NPDES program"). Moreover, Congress expressly included EPA actions approving or promulgating specific regulations in other provisions of Section 1369(b)(1). *See* 33 U.S.C. §§ 1369(b)(1)(A), (C), (E), and (G). If Congress had intended for EPA's promulgation of NPDES regulations to be included in Section 1369(b)(1)(F), it would have expressly said so.[10]

Thus, the EPA actions underlying this case do not fall within the plain language of Section 1369(b)(1)(E) or (F).

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[10] Several district courts have properly reviewed challenges to rules exempting discharges from the NPDES program. *See Natural Res. Def. Counsel, Inc. v. Costle*, 568 F.2d 1369, 1372–73, 1383 (D.C. Cir. 1977) (affirming district court decision holding EPA's categorical exemption for stormwater discharges *ultra vires*); *EPIC*, 266 F.Supp.2d at 1113–20 (concluding that the district court had jurisdiction to review EPA rule exempting silvicultural discharges from the NPDES program); *NWEA*, 537 F.3d at 1010 (affirming district court decision exercising jurisdiction over challenge to EPA rule exempting vessel discharges from the NPDES program); *ONRC Action v. U.S. Bureau of Reclamation*, Civ. No. 97–3090–CL, 2012 WL 3526833, at *24–28 (D. Or. Jan. 17, 2012), *report and recommendation adopted*, No. 1:97–CV–03090–CL, 2012 WL 3526828 (D. Or. Aug. 14, 2012) (holding that district court had jurisdiction over challenge to rule exempting "water transfers" from the NPDES program).

C. Neither *E.I. du Pont* Nor *Crown Simpson* Establishes that Section 1369(b)(1) Extends to EPA Rules Exempting Discharges from the NPDES Program

Petitioners and their amici rely on this Court's decisions in *E.I. du Pont* and *Crown Simpson*. *See, e.g.*, Industry Br. 51; U.S. Br. 22. But those decisions reflect narrow holdings appropriately tailored to a narrow statutory provision.

In *E.I. du Pont*, this Court considered whether Section 1369 provides the courts of appeals with jurisdiction over challenges to "industry-wide regulations imposing . . . precise [effluent] limitations" on existing dischargers. 430 U.S. at 115. This Court's determination that EPA had authority to promulgate effluent limitation regulations under Section 301 "necessarily resolve[d]" the jurisdictional question, because the courts of appeals plainly have jurisdiction over such regulations under Section 1369(b)(1)(E). *Id.* at 136. Once this Court found EPA could promulgate effluent limitations, it looked to the plain meaning of Section 1369 and easily answered the jurisdictional question.

In rejecting the argument that the courts of appeals lacked original jurisdiction, this Court expressed concern that such an interpretation would result in a "truly perverse situation in which the court of appeals would review the numerous individual actions issuing or denying permits pursuant to [Section] 402 but would have no power of direct review of the basic regulations governing those individual actions." *Id.* at 136. The "basic

regulations" this Court was referring to were, of course, the *effluent limitations* at issue in the case. Regulations exempting discharges from the NPDES program are plainly not effluent limitations, as discussed above. And this Court's decision in *E.I. du Pont* should not be expanded beyond its narrow context to support the notion that *all EPA CWA regulations*, or even all NPDES regulations, must therefore be challenged in the courts of appeals.

In *E.I. du Pont* this Court even recognized the probability that certain EPA actions very much resembling the promulgation of effluent limitations would not themselves be subject to review in the courts of appeals under Section 1369. "If industry is correct that the regulations can only be considered [Section 1314] guidelines, suit to review the regulations could probably be brought only in the District Court, if anywhere." *Id.* at 125. This is because Section 1314 is not listed in Section 1369(b)(1). Promulgation of Section 1311 binding effluent limitations and adoption of Section 1314 effluent limitation guidelines are closely related actions.[11] Indeed, the link between effluent

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[11] As noted above, the CWA defines "effluent limitation" as "any restriction . . . on quantities, rates, and concentrations of" pollutants. 33 U.S.C. § 1362(11). In contrast, "effluent limitation guidelines" assist the EPA in determining effluent limitations by, for example, "identify[ing] . . . the degree of effluent reduction attainable through the application of the best practicable control technology available" and "specify[ing] factors to be taken into account in determining the control measures and practices to be applicable to point sources .

limitations and effluent guidelines is far closer than the connection Petitioners have drawn here between the rules at issue in this case and any action listed under Section 1369(b)(1). But, the point is that this Court resisted the notion that even very closely related actions should be swept into Section 1369's coverage.

This Court's decision in *Crown Simpson* is similarly inapplicable here. In *Crown Simpson,* this Court found that the courts of appeals had original jurisdiction under Section 1369(b)(1)(F) over EPA's objection to a state-issued NPDES permit because EPA's objection was "functionally similar" to EPA's denial of an NPDES permit. 445 U.S. at 196. As the Ninth Circuit has recognized, *Crown Simpson* adopted a narrow understanding of "functional similarity," only finding that EPA's objection to a state-issued NPDES permit—which at the time[12] had

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within such categories or classes." 33 U.S.C. §§ 1314(b)(1)(A)–(B) (2006). Thus, EPA's action in "approving or promulgating any effluent limitation" is informed by, but not the same as, EPA's action promulgating regulations providing guidance to the EPA on the setting of effluent limitations. *See, e.g., Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005) (noting that "[t]he specific effluent limitations" at issue in the case "are dictated by the terms of more general 'effluent limitation guidelines'", and that the effluent limitations were "established in accordance with" the effluent limitation guidelines).

[12] Congress later amended the CWA, authorizing EPA to issue a permit itself if a state does not meet the terms of EPA's objections. *See* 33 U.S.C. § 1342(d)(4); *Am. Paper Inst.*, 890 F.2d at 874 ("[W]e believe that the [CWA] amendments to the

the "precise effect" of denying the permit—was "functionally similar" to EPA's denial of a permit. *NWEA*, 537 F.3d at 1016 (citing *Crown Simpson*, 445 U.S. at 196).[13] As the denial of a permit is specifically listed within Section 1369(b)(1), it is wholly unremarkable that the courts of appeals would review such an action. And as discussed above, EPA's action exempting discharges from the NPDES program does not have the "precise effect," or even close to the same effect, as the issuance or denial of an NPDES permit. Thus, *Crown Simpson* is not determinative of the instant case.

This Court in both *E.I. du Pont* and *Crown Simpson* found that the courts of appeals could hear direct challenges only to EPA actions listed in Section 1369 or actions that had the "precise effect" of listed actions. Neither case supports Petitioners' argument that this Court should read Section 1369 to include EPA actions that Congress clearly excluded from the

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FWPCA fundamentally altered the underpinnings of the *Crown Simpson* decision."). The fact that Congress addressed the very quandary this Court was faced with makes *Crown Simpson*'s relevance to this case even more strained.

[13] *See also Nat'l Mining Ass'n v. Jackson*, Nos. 10–1220 (RBW), 11–0295(RWB), 11–0446(RBW), 11–0447(RBW), 2012 WL 3090245, at *10 (D.D.C. July 31, 2012) (finding that EPA's Final guidance was not "functionally similar" to the issuance or denial of an NPDES permit, because even though it "'relates to' the issuance of 402 permits . . . it [did] not amount to an EPA issuance or denial of a 402 permit" (citations omitted)).

scope of the provision. [14]

D. Courts and EPA Have Improperly Departed from the Statute

Despite the unambiguous language of Section 1369(b)(1), Petitioners ask this Court to expand the Section's plain meaning to include EPA's regulations exempting discharges from the NPDES program. Petitioners and their supporting amici rely on a handful of courts of appeals decisions construing Section 1369 as providing them with direct review over not only EPA's issuance or denial of an NPDES permit, but over all NPDES program regulations. *See, e.g., Am. Mining Cong. v. EPA*, 965 F.2d 759, 764 (9th Cir. 1992) (court of appeals had original jurisdiction under Section 1369(b)(1)(F) to review "regulations governing the issuance of permits under [S]ection 402"); *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1296–97 (9th Cir. 1992) (court of appeals had original jurisdiction under 1369(b)(1)(F) to review "rules that regulate the underlying permit procedures"); *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (court of appeals had

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[14] Other decisions from this Court counsel against an expansive reading of similar judicial review provisions. *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring) (expressing concern that a broad reading of the CAA's judicial review provision would raise "constitutional difficulties" because "a failure to seek immediate review will bar affected parties from challenging the [EPA] action in a subsequent criminal prosecution").

original jurisdiction under Section 1369(b)(1)(F) to review EPA rule exempting certain discharges from the NPDES permit requirements); *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 932–33 (6th Cir. 2009) (court of appeals had original jurisdiction under 1369(b)(1)(F) to review EPA rule exempting certain pesticides from the NPDES permit requirements).

Not one of these decisions, however, includes more than a few sentences of analysis of the courts' original jurisdiction under Section 1369. Moreover, these courts have stretched this Court's decision in *E.I. du Pont* well beyond the narrow issue before the Court in that case. For example, the court in *American Mining Congress* misapplied *E.I. du Pont* by taking this Court's admonition against creating a "perverse situation" out of its original context of effluent limitation regulations and applying it to regulations governing NPDES permitting decisions. 965 F.2d at 763. As discussed above, this Court's reference to the "basic regulations" meant the effluent limitations at issue in that case, which were *promulgated via regulation*, not NPDES regulations generally. *E.I. du Pont*, 430 U.S. at 136. The *American Mining Congress* court's misapplication of *E.I. du Pont* forged the above-mentioned chain of case law that has become untethered to the statutory basis of this Court's ruling.[15] *American Mining*

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[15] Other courts began suggesting a broader interpretation of Section 1369 even before this line of cases, though the reach of their analyses was not always clear. For example, in *Natural*

Congress and subsequent courts erred in assuming that *E.I. du Pont* provides them with original jurisdiction over regulations governing NPDES permitting procedures.[16]

EPA too stepped off-track somewhere along the way. In promulgating early NPDES regulations, EPA stated that "review is not provided for actions in issuing general regulations governing the issuance of NPDES permits," but rather that the CWA's review provision applies only to "individual permit issuance actions." 44 Fed. Reg. at 32,855. EPA also explicitly or implicitly took the same position in litigation. Notably, the D.C. Circuit's landmark decision in *Natural Resource Defense Counsel v. Costle,* holding

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Resources Defense Council, Inc. v. EPA, the D.C. Circuit held that Section 1369(b)(1)(E) applied to NPDES regulations that included some provisions "guid[ing] the setting of numerical limitations in 1369." 673 F.2d 400, 402, 404 (D.C. Cir. 1982). To the extent the court believed it had jurisdiction over every regulation included in the 1980 Consolidated Permit Regulations ("CPRs"), it was mistaken. That the courts of appeals might have jurisdiction over challenges to "some of the CPRs", *id.* at 404, does not support the conclusion that the courts of appeals have jurisdiction over challenges to all of the CPRs. The D.C. Circuit also offered no support for its distinction between policy-based rules and substantive rules. *Id.* at 405 & n.15.

[16] Even if this Court were to expand the "perverse situation" concern here, the same dynamic would not exist. An exemption from the NPDES program ensures that the courts of appeals will never be asked to review the grant or denial of a permit.

EPA's categorical exemption for stormwater discharges *ultra vires*, arose from an appeal of a district court decision. *See Natural Res. Def. Counsel, Inc. v. Train*, 396 F.Supp. 1393 (D.D.C. 1975), *aff'd sub nom., Natural Res. Def. Counsel, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In that challenge to EPA's first attempt to exempt silvicultural operations from the NPDES program, EPA did not contest the district court's jurisdiction to hear the case. *See also Am. Iron & Steel Inst.*, 543 F.2d at 524–25 (agreeing with EPA that court of appeals lacked original jurisdiction over Net-Gross Regulations "in the absence of [EPA action] issuing or denying a permit"). It is unclear why EPA changed course, but for all of the reasons above, its earlier interpretation was the correct one.

II. AN EXPANSIVE READING OF SECTION 1369 DISRUPTS THE TRADITIONAL JURISIDCTION FEDERAL COURTS MAINTAIN TO REVIEW AGENCY RULES AS-APPLIED

Petitioners' arguments, if accepted, would improperly limit a court's power to review agency rules and interpretations. Petitioners contend that jurisdiction under the CWA is bifurcated into a world of only two possibilities: one where "parties seeking to challenge the substance of EPA's rules may do so through a rule-review process," and another for "parties seeking enforcement of those regulations [through] citizen-suit provisions." Industry Br. 31–32; *see also* Chamber Br. 2 ("courts sitting to hear

citizen suits enjoy jurisdiction only to enforce EPA's rules, not to invalidate them"); Amicus Curiae Br. of Mountain States Legal Found. in Support of Pet'rs 15–16 ("It is axiomatic that the purpose of citizen suits is to enforce EPA regulations, not to invalidate them."). Not only does this oversimplified picture of the CWA find no support in the statute itself—Section 1369(b) by its plain terms does not apply to all rules (*see supra*)—it also runs counter to this Court's precedent under the CWA and other statutes.

Petitioners' contention that the legality of CWA regulations may only be evaluated in a Section 1369 facial challenge to a rule would mean that this Court has overstepped in several seminal CWA cases. This Court has considered on three occasions, without hesitation, a threshold legal question underlying the issuance of any NPDES permit: the scope of CWA regulations defining waters of the United States. *United States v. Riverside Bayview Homes, Inc.*, 421 U.S. 121, 123 (1985) (considering "adjacent wetlands" under 33 C.F.R. §328.3(a)(7)); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171–72 (2001) (invalidating the Army Corps of Engineers' ("Corps") and EPA's extension of 33 C.F.R. § 328.3(a)(3) "other waters" to include waters based solely on the presence of migratory birds); *Rapanos v. United States*, 547 U.S. 715, 730–31 (2006) (evaluating jurisdiction over wetlands adjacent to tributaries, 33 C.F.R. § 328.3(a)(5) and (a)(7)). These were EPA-issued CWA regulations that did not come to the Court via direct review

under Section 1369.[17] Yet this Court squarely considered the regulations' legality. Under Petitioners' view, presumably this Court lacked the jurisdiction to do so.

Even more recently, this Court evaluated the scope of the CWA regulations governing "fill material" under Section 1344 and the new source performance standards ("NSPS") issued under Section 1316. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council ("Coeur Alaska")*, 557 U.S. 261 (2009). The respondents in *Coeur Alaska* brought suit against the Corps arguing that a CWA permit issued under Section 1344 was not "in accordance with law" because the discharge of mining slurry into a pond was subject to Section 1342. *Id.* at 261. The heart of the respondents' claim was that EPA failed to apply the NSPS regulations, promulgated pursuant to CWA Section 1316(b), to the mining slurry discharge. *Id.* (citing 40 C.F.R. § 440.104(b)(1) (2012)).

Respondent here is pursuing a parallel claim—the application of a Section 1342 regulation, which EPA believes is inapplicable to the discharge at issue. Petitioners' sweeping interpretation of Section 1369 would have barred the Court's decision in *Coeur Alaska*. This is because the respondents there did

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[17] These decisions cite to the Corps regulations, which are identical to the jointly-issued EPA regulations on these issues. *See* 40 C.F.R. § 122.2 (2012) (EPA); 33 C.F.R. § 328.3(a) (2012) (Corps).

not bring a facial challenge to the NSPS regulations, governing "process wastewater" and not exempting "fill material," when the regulations were promulgated in 1982. *See* 47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982).[18] This Court in *Coeur Alaska* explained that it only became clear that Section 1344 could trump the application of Section 1342 years after the NSPS regulations were promulgated.[19] So too here, EPA did not make clear until 2010 that it believed channelized runoff from logging roads fell within the exemption in the Silvicultural Rule. *Joint Appendix Vol. 1*, at 60. Petitioners' view of Section 1369 is therefore inconsistent with the necessity for judicial review that this Court exercised in *Coeur Alaska*.

These decisions highlight an important point. The

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[18] If any lawsuit asserting the applicability of an NPDES regulation was to fall within Section 1369(b)(1), *Coeur Alaska* would have been closer than the case at bar. That is because regulations promulgated under Section 1316 are at least on the list of regulations subject to review under Section 1369(b)(1). *See* 33 U.S.C. § 1369(b)(1)(E) (requiring review of an "Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under Section 1311, 1312, 1316, or 1345 of this title").

[19] Two important events occurred after the 1982 regulations were promulgated. First, EPA and the Corps defined "fill material" using an "effects-based test" in 2002. 67 Fed. Reg. 31,129, 31,132 (May 9, 2002). Second, the agencies analyzed whether mine tailings slurry could be subject to a Section 1344 permit, and clarified the relationship between Sections 1342 and 1344, in the 2004 Regas Memorandum. *Coeur Alaska*, 557 U.S. at 283–87.

right of action to seek immediate, facial review of the validity of certain EPA CWA actions is the *exception* to the otherwise applicable assumption that agency rules may be evaluated on an as-applied basis. The Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, acknowledges this broad scope of review in Section 701(a), where judicial review is granted "except to the extent that–(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." In evaluating statutory preclusion principles, this Court has routinely upheld a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative actions." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (permitting review of an agency action under the Immigration and Nationality Act).[20] In order to rebut this presumption, there must be "clear and convincing evidence" to the contrary. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). A narrow interpretation is consonant with the general presumption of reviewability under the APA and this

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[20] *See also Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 675–78 (1986) (interpreting the Medicare statute to allow an individual to challenge a regulation's validity despite a preclusion on review for individual claims under the statute); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (explaining that when a statute is "reasonably susceptible to divergent interpretation," this Court adopts the reading "that executive determinations generally are subject to judicial review").

Court's previous review of CWA regulations outside the context of Section 1369.

III. PETITIONERS' ARGUMENTS MAKE NO SENSE AS A PRACTICAL MATTER

The practical implications of Petitioners' arguments are troubling, as applied to this case and beyond. Petitioners set up a burden that would have been nearly impossible for Respondent in this case to meet. Moreover, an expansive reading of Section 1369 invites challenges to every EPA CWA action even if not ripe, lest interested parties risk being forever precluded from seeking review. And on the flipside, Petitioners' arguments would permit agencies to develop *post-hoc* interpretations of regulations beyond the 120-day review period, enjoying immunity from suit even if such interpretations are *ultra vires*. This cannot be the result Congress intended.

For starters, if Petitioners are correct, Respondent was required to challenge, *inter alia*, the Silvicultural Rule when the rule was promulgated.[21]

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[21] *See* Industry Pet. for Cert. 29 (arguing "it has been clear since those regulations were promulgated in 1990 that channeled forest road runoff is not a stormwater discharge associated with industrial activity"); Reply Br. Industry Pet. for Cert. 6 ("EPA has repeatedly stated for more than 35 years that forest road precipitation runoff does not become a point source when it is channeled"); Industry Br. 54 ("For 35 years, the meaning of the Silvicultural Rule has been clear: precipitation

Yet, it is inconceivable how Respondent could have been on notice of EPA's interpretation of the rule. Indeed, EPA has acknowledged that it announced its interpretation of the regulation "for the first time" in this very litigation. *Joint Appendix Vol. 1*, at 60.[22] Thus Respondent would have been required to invent the facts surrounding the current controversy.

The implausibility of this scenario is evidenced in the regulatory history. The phrase "natural runoff" crept into the text of the Silvicultural Rule without comment or explanation.[23] The regulatory creep of

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runoff from forest roads, whether or not collected in ditches, is nonpoint source and not subject to permitting. And since its adoption in 1990, EPA's Phase I rule has made clear that collected runoff is not a point source discharge 'associated with industrial activity.' EPA has reiterated these interpretations time and again, and has enforced each consistently from the outset.").

[22] The United States in its 2010 Amicus Brief to the Ninth Circuit argued that Section 1369(b)(1) expressly permitted Respondent's challenge because "the pertinent EPA interpretation [was] offered well after the regulation [was] promulgated." *Joint Appendix Vol. 1*, at 60.

[23] The term "runoff" first appeared in a comment to the EPA's 1978 proposed revision to the 1976 Silvicultural Regulations. 43 Fed. Reg. 37,078, 37,104 (Aug. 21, 1978). The finalized 1980 Silvicultural Rule also included "runoff" it its comment section. 44 Fed. Reg. at 32,914. Without public comment, or EPA elaboration, the term "natural runoff" was adopted into the text of the 1980 regulation. 45 Fed. Reg. 33,290, 33,447 (May 19, 1980). And this rule amendment followed closely on the heels of the D.C. Circuit's seminal decision in *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), which, as explained above, held

the phrase "natural runoff" begs an important question—precisely what could Respondent have challenged at the time of the rule's promulgation if there was no comment or explanation from EPA regarding what "natural runoff" means?[24]

And this argument poses problems well beyond this case. At bottom Petitioners' argument runs afoul of the ripeness doctrine. It is well settled that a party bringing a prospective claim regarding the hypothetical application of a rule to a scenario unimagined by an agency is not ripe for adjudication.

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that EPA did not have the authority to exempt classes of discharges from the CWA. This context makes it even more implausible that Respondent or any other interested party should have read the Silvicultural Rule amendment as an exemption.

[24] Perhaps equally unworkable is the United States' suggestion that Respondent should have directly challenged EPA's interpretation of the Silvicultural Rule announced for the first time in an amicus brief in the proceedings below. U.S. Br. 22–23 n.8 (noting that EPA's clarification in a filing might "provide a new opportunity for review of the rule itself" under Section 1369(b)(1)'s exception for grounds arising after the 120-day limitations period). The questions regarding how such a procedure should unfold are innumerable (*see* NEDC Br. 21–22), and this approach would only exacerbate the procedural confusion at play in the lower courts today, as discussed below. Moreover, the United States' suggestion is troubling, given that Respondent would not have been the only entity interested in the United States' new interpretation of its rule. Yet the Government would apparently hold the general public responsible for knowing what EPA states in every amicus brief it files or else be barred under Section 1369(b) from bringing a later challenge.

The basic premise behind the ripeness doctrine is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148–49.

This Court has categorically held that a party cannot challenge an anticipated agency interpretation. In *Ohio Forestry Ass'n, Inc. v. Sierra Club ("Ohio Forestry")*, the Court found that respondents' claim, challenging a speculative application of a general forestry plan, was not ripe for review. 523 U.S. 726, 728 (1998). Conjuring up future applications of regulations does "not create adverse effects, . . . command anyone to do anything or to refrain from doing anything, . . . grant, withhold, or modify any formal legal license . . . ." *Id.* In short, an imagined application of agency regulations does not create any "legal rights or obligations." *Id.* The logic behind *Ohio Forestry* is simple. Courts are loathe to consider claims that are not ripe because it would require a court to "predict" and anticipate consequences of a regulation that are not present and "may change over time." *Id.* at 736.

Moreover, requiring a party to challenge every potential application of an agency regulation, even before a particular application is understood, opens the floodgates to filings at a court of appeals. As the United States recognized in its brief before the Ninth Circuit, parties would be required to "challenge [any]

potential regulatory interpretations that are textually plausible." *Joint Appendix Vol. 1*, at 60. Though other amici in support of Petitioners raise the specter of legal uncertainty,[25] it is their position that is sure to lead to a litany of litigation and confusion. The world of judicial review of EPA's actions under the CWA is already messy. As one court explained, litigants must "hire a horde of lawyers" to maneuver through the CWA and expend "tremendous resources in time and money and considerable legal skill . . . into finding out the proper address for an appeal." *Longview Fibre Co.*, 980 F.2d at 1314. The confusion in the courts has already led to many litigants filing in both the district court and the court of appeals to protect their claims, then often seeking to stay one litigation and proceed with the other. *See, e.g., Natural Res. Def. Council, Inc.*, 673 F.2d at 402; *NWEA*, 537 F.3d at 1014; *Nat'l Cotton Council*, 553 F.3d at 932; *ONRC Action*, 2012 WL 3526833, at *7–8.[26] A broad interpretation of Section

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[25] *See, e.g.*, Chamber Br. 4 (arguing that the court of appeals' reading of Section 1369 will "subject countless . . . regulated parties to new degrees of legal uncertainty across the entire swath of Code of Federal Regulations provisions").

[26] This recent case highlights tensions in the lower courts today, as a result of expansive and inconsistent interpretations of Section 1369. In *ONRC Action*, the plaintiffs brought an enforcement action against a government agency for discharging without an NPDES permit. 2012 WL 3526833, at *1. Though EPA was not a party to the suit, the district court analyzed EPA's Water Transfers Rule, which would have exempted the government agency's discharge from the NPDES program, to determine whether the rule was consonant with the CWA. *Id.*

1369(b)(1), like the Petitioners advance here, will only exacerbate this problem. *Longview Fibre Co.*, 980 F.2d at 1313. ("[T]he more [courts] pull within [Section 1369(b)(1)], the more arguments will be knocked out by inadvertence later on—and the more reason [law] firms will have to petition for review of everything in sight." (quoting *Am. Paper Inst. v. EPA*, *v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (Easterbrook, J.)). If Section 1369(b) is read to apply to all EPA CWA rules, query what well-counseled regulated entity or conservation organization would allow *any* EPA rule to remain unchallenged in the courts of appeals.

Aside from creating more litigation and needlessly burdening the federal courts, this position is also perplexing in its implications for the regulated community. For example, amicus Chamber of Commerce pleads for an "even field defined by settled rules," but its interpretation obliterates the rights of its own members to protect their interests. Chamber Br. 5. This is because any lawsuit questioning the application of NPDES regulations would be barred 120 days after the regulation's promulgation. The natural consequence of perceiving Section 1369(b)(1) through this looking glass is that Chamber's members would also be barred from challenging *post-*

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at *24–28. The district court found that it had jurisdiction to hear as-applied challenges to the Water Transfers Rule, even though the Eleventh Circuit had exercised jurisdiction over consolidated facial challenges to the Water Transfers Rule, which had been filed directly in the courts of appeals. *Id.* at 8.

hoc agency interpretations of ambiguous regulations, no matter how such an interpretation might affect a particular business. This result was explicitly recognized by amici National Association of Home Builders and National Association of Manufacturers, *et al.* Br. Amici Curiae National Association of Home Builders and National Association of Manufacturers 8–9. Their rather unhelpful solution to this conundrum, however, is only that this Court's ruling can be limited to "the facts of the case at hand." *Id.* at 9. There is no comfort blanket that categorically shields EPA from challenges to newly adopted regulatory meanings, let alone rules that fall outside the enumerated provisions of 1369(b)(1).

Forbidding review of an agency action that has yet to occur would have the pernicious result of allowing "[t]he government . . . to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs." *Wind River Mining Corp. v. United States ("Wind River")*, 946 F.2d 710, 715 (9th Cir. 1991). Judge O'Scannlain's reasoning in *Wind River*, which addresses an analogous problem posed by statutes of limitation, is enlightening.[27] An expansive view of Section 1369 would permit the agency to adopt interpretations of its regulations, after promulgation, that are immune to challenge

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[27] While "statutes of limitations . . . often serve to bar litigation of the merits of otherwise valid legal challenges," these bars are not absolute. *Compare* Chamber Br. 10, *with Wind River*, 946 F.2d at 715–16.

even if they are *ultra vires*.

If this Court reaches the Section 1369(b) issues in this case, the Court should decline Petitioners' invitation to expand the provision beyond the clear, discernible limits set forth in the text itself.

CONCLUSION

For the foregoing reasons, the district court had jurisdiction to hear Respondent's case.

Respectfully submitted,

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October 23, 2012

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RECORD
AND
BRIEFS

Nos. 11-338, 11-347

In The
Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Congress authorized citizens dissatisfied with the Environmental Protection Agency's rules implementing the Clean Water Act's permitting program to seek judicial review of those rules in the courts of appeals. Congress further specified that those rules could not be challenged in any civil or criminal enforcement proceeding. Did the Ninth Circuit err when it held that a citizen may bypass the exclusive method of seeking judicial review of a permitting rule, and challenge the validity of the rule in a citizen suit to enforce the Clean Water Act against regulated parties?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its creation in 1977, MSLF and its attorneys have been involved in numerous cases concerning the proper interpretation and administration of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. *E.g.*, *Sackett v. EPA*, ___ U.S. ___, 132 S. Ct. 1367 (2012) (amicus curiae); *Coeur Alaska, Inc.*

[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this amicus curiae brief by filing blanket consents with this Court. Pursuant to Supreme Court Rule 37.6, counsel for MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity other than MSLF, its members, and counsel made a monetary contribution specifically for the preparation or submission of this brief.

v. Southeast Alaska Conservation Council, 557 U.S. 261 (2009) (amicus curiae); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (amicus curiae); *Rapanos v. United States*, 547 U.S. 715 (2006) (amicus curiae); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (represented plaintiff); *Child v. United States*, 851 F. Supp. 1527 (D. Utah 1994) (represented plaintiff); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (amicus curiae).

In addition, MSLF has members throughout the western United States who are actively involved in the timber industry. The outcome of this case may have serious consequences for these members. Indeed, if the Ninth Circuit's decision is allowed to stand, persons and private entities, including MSLF's members, who own, operate, and/or use forest roads for transporting timber within the jurisdiction of the Ninth Circuit will be exposed to the threat of citizen suits and the associated civil liability. Although the Ninth Circuit suggested that EPA could issue a general permit to cover forest roads over which timber is transported, EPA is not a party to this case. Thus, EPA has no obligation to do anything. Meanwhile, the threat of citizen suits will continue to hang over those who seek to provide timber to the American public.

To make matters worse, the Ninth Circuit eviscerated the exclusive system established by Congress

for challenging the validity of EPA regulations promulgated under the CWA. Under the Ninth Circuit's decision, environmental groups may now challenge the validity of EPA's regulations in citizen suits against private parties in which EPA is not a party. Accordingly, MSLF respectfully submits this amicus curiae brief in support of Petitioners.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

A. The Clean Water Act.

Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." [2] 33 U.S.C. § 1251(a). To accomplish this objective, Congress sought to create a uniform system for regulating point source discharges.[3] *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). For example, Section 301(a) of the CWA provides that, subject to certain exceptions, the "discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). One of these exceptions is a point source discharge authorized by a permit issued pursuant to the

[2] EPA is charged with administering the CWA. 33 U.S.C. § 1251(d).

[3] A "point source" is generally "any discernible, confined and discrete conveyance[.]" 33 U.S.C. § 1362(14).

National Pollutant Discharge Elimination System ("NPDES") under Section 402, 33 U.S.C. § 1342. The combined effect of Sections 301(a) and 402 is that it is unlawful to discharge a pollutant from a "point source" into waters of the United States without a NPDES permit.

Although not specifically defined in the CWA, nonpoint source pollution is generally viewed as water pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. *See Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 849 n.9 (9th Cir. 1987) (examples of nonpoint source pollution include runoff from irrigated agriculture and silvicultural activities). As a result, a NPDES permit is not required for nonpoint source pollution, which is more appropriately regulated through other means, such as best management practices.

In passing the CWA, Congress also included a special judicial-review provision for challenging EPA regulations relating to the NPDES program. 33 U.S.C. § 1369(b). This provision provides that the courts of appeals have jurisdiction to review EPA "action . . . in approving or promulgating any effluent limitation or other limitation under [33 U.S.C. §§ 1311, 1312, 1316, or 1345], [and] in issuing or denying any permit under [33 U.S.C. § 1342]." 33 U.S.C. § 1369(b)(1); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977). This provision further provides that an application for judicial review "shall be made" in a court of appeals "within 120 days

from the date" of EPA's action, or after the 120th day "if such application is based solely on grounds which arose" subsequent thereto. 33 U.S.C. § 1369(b)(1). That Congress intended 33 U.S.C. § 1369(b) to provide the exclusive means of challenging EPA regulations relating to the NPDES program is evident from the following language: "[A]ction of the Administrator with respect to which review could have been obtained under [33 U.S.C. § 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2).

In addition to establishing an exclusive method for challenging NPDES-related regulations, Congress also included a citizen-suit provision in the CWA for *enforcing* those regulations. 33 U.S.C. § 1365. Under the citizen-suit provision, a citizen may commence an action against any person, including the United States, "who is alleged to be in violation of . . . an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). It is axiomatic that the purpose of citizen suits is to enforce EPA regulations, not to invalidate them. *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 265 (3d Cir. 1991) (citizen suits under the Clean Air Act are for the purpose of enforcing EPA standards).[4]

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[4] The CWA and the Clean Air Act are read in *pari materia*. *United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1187 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984); *United States v. Anthony Dell'Aquilla, Enterprises and Subsidiaries*, 150 F.3d 329, 338 n.9 (3d Cir. 1998).

B. EPA's Silvicultural Rule.

In 1976, EPA issued its Silvicultural Rule. 41 Fed. Reg. 24,709-24,712 (Jun. 18, 1976). This Rule, after a minor revision in 1980 (45 Fed. Reg. 33,290 (May 19, 1980)), currently provides, in relevant part:

> "Silvicultural point source" means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, *harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.*

40 C.F.R. § 122.27(b) (emphasis added). Thus, under the plain language of EPA's 30-year-old Silvicultural Rule, all natural runoff from harvesting operations, surface drainage, and road construction and maintenance is treated as nonpoint source pollution, even if the runoff is ultimately discharged through a discrete conveyance. Importantly, no one sought judicial review of the Silvicultural Rule when it was promulgated in 1976 or when it was revised in 1980.

C. The 1987 Stormwater Amendments.

In 1987, Congress amended the CWA to specifically deal with water pollution caused by stormwater. Pub. L. No. 100-4, 101 Stat. 7 (1987). In so doing, Congress added Section 402(p) to the CWA, 33 U.S.C. § 1342(p), which establishes a two-phase approach to stormwater discharges. Section 402(p) prohibited EPA from requiring NPDES permits for stormwater discharges until October 1, 1994, except for five categories of so-called "Phase I" stormwater discharges. 33 U.S.C. §§ 1342(p)(1), (2). As relevant here, one Phase I category is "discharge associated with industrial activity." 33 U.S.C. § 1342(p)(2). Congress mandated NPDES permits for the Phase I stormwater discharges and directed EPA to promulgate regulations governing them. 33 U.S.C. §§ 1342(p)(3), (4).

With respect to those stormwater discharges not included in Phase I, Congress instructed EPA to study those discharges, determine which ones needed to be regulated, and establish a comprehensive program to regulate these so-called "Phase II" stormwater discharges. 33 U.S.C. §§ 1342(p)(5) and (6). Importantly, stormwater discharges not regulated under either Phase I or Phase II are not subject to NPDES permitting requirements. *See Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 330-32 (D. Vt. 2004), *aff'd*, 139 Fed. Appx. 338 (2d Cir. 2005).

D. EPA's Stormwater Regulations.

In 1990, EPA promulgated its Phase I stormwater regulations. 55 Fed. Reg. 47,990-48,075 (Nov. 16, 1990) (codified in 40 C.F.R. Part 122). Because Congress did not define the term "discharge associated with industrial activity," EPA defined the term to exclude "discharges from facilities or activities excluded from the NPDES program under [40 C.F.R. Part 122]." 40 C.F.R. § 122.26(b)(14). Thus, all activities that were defined as nonpoint source silvicultural activities under EPA's Silvicultural Rule (codified at 40 C.F.R. § 122.27(b)), are excluded from the definition of stormwater "discharge associated with industrial activity." 55 Fed. Reg. at 48,011. EPA also explained that it would evaluate discharges from forest roads under Phase II. *Id.*

In 1999, EPA adopted its Phase II stormwater regulations. *See* 64 Fed. Reg. 68,722-68,851 (Dec. 8, 1999). In so doing, EPA designated two additional categories of stormwater discharges for regulation and retained the authority to designate others on a case-by-case basis. *Id.* at 68,724. In *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), the Ninth Circuit upheld EPA's Phase II stormwater regulations in most respects. However, the Ninth Circuit held that, in promulgating the Phase II regulations, EPA had not responded adequately to comments asserting that EPA should require NPDES permits for stormwater discharges from forest roads. *Id.* at 860-63. Implicit in this ruling is that discharges involving runoff from forest roads may be regulated,

if at all, under Phase II. *See id.* at 863 ("[W]e remand this issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) [of the CWA] requires EPA to regulate forest roads.").

II. PROCEDURAL BACKGROUND.

On September 5, 2006, Respondent, Northwest Environmental Defense Center, filed a citizen suit, under 33 U.S.C. § 1365, against Petitioners, the Oregon State Forester and members of the Oregon Board of Forestry in their official capacities (collectively "the State") and several timber companies.[5] Respondent alleged that the State and the timber companies were violating the CWA by discharging stormwater from two forest roads without NPDES permits.

Before the district court, the United States filed an amicus brief explaining its position that, under both its Silvicultural Rule and Phase I stormwater regulations, discharges from forest roads do not require a NPDES permit. United States' Amicus Curiae Brief at 11-31, *NEDC v. Brown,* No. 306-CV-01270 (D. Or., filed Dec. 6, 2006). Based, in part, on the United States' amicus brief, the district court dismissed Respondent's citizen suit for failure to state a claim. *NEDC v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2007).

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[5] The Oregon State Forester and members of the Oregon Board of Forestry are Petitioners in No. 11-338 and the timber companies are Petitioners in No. 11-347.

On appeal, the United States filed another amicus brief, again explaining that under its Silvicultural Rule and Phase I regulations, discharges from forest roads did not require a NPDES permit. Amicus Curiae Brief of the United States at 13-20, *NEDC v. Brown,* 9th Cir. No. 07-35266, (filed Nov. 16, 2007). The United States also noted that the Ninth Circuit lacked jurisdiction over Respondent's citizen suit because it was a challenge to EPA's Silvicultural Rule and Phase I stormwater regulations. *Id.* at 12-13. The United States explained that such a challenge could be brought only within the 120-day limitation period in 33 U.S.C. § 1369(b)(1), and that Respondent could not circumvent review in a court of appeals by styling its challenge as a citizen suit. *Id.*

The Ninth Circuit, however, reversed. *NEDC v. Brown*, 617 F.3d 1176 (9th Cir. 2010). In so doing, the Ninth Circuit concluded that EPA's Silvicultural Rule was invalid because it was susceptible to two "possible readings[,]" both of which violated the CWA. *Id.* at 1184-91. After ruling the Silvicultural Rule was invalid, the Ninth Circuit ruled that EPA's Phase I stormwater regulations were invalid. *Id.* at 1194-96.

Petitioners timely sought rehearing. While the petitions for rehearing were pending, the Ninth Circuit asked the parties to address whether it had jurisdiction over NEDC's citizen suit. In response to that question, the United States filed another amicus brief, in which it argued that the judicial-review provision in 33 U.S.C. § 1369(b) generally bars courts from reviewing the validity of EPA regulations in a

citizen suit. Amicus Curiae Brief of the United States at 5-7, *NEDC v. Brown,* 9th Cir. No. 07-35266 (filed Feb. 10, 2011). The United States then argued that, because the Ninth Circuit had ruled the Silvicultural Rule ambiguous, the Ninth Circuit had jurisdiction over Respondent's citizen suit. *Id.* at 10-11.

On May 17, 2011, the Ninth Circuit denied the petitions for rehearing, vacated its original opinion, and issued a superseding opinion in which it again reversed the judgment of the District Court. *NEDC v. Brown*, 640 F.3d 1063 (9th Cir. 2011). The Ninth Circuit first ruled that it had jurisdiction over Respondent's citizen suit. *Id.* at 1068-69. In so ruling, the Ninth Circuit concluded that Respondent could not have sought review of the Silviculture Rule when it was promulgated because no one could have known how EPA interpreted the Rule before the United States filed its amicus curiae brief in this case. *Id.* Thus, the Ninth Circuit determined that the case fell "within the exception in [33 U.S.C. § 1369(b)(1)] for suits based on grounds arising after the 120-day filing window." *Id.* at 1069.

The Ninth Circuit then reviewed the history of the Silvicultural Rule. *Id.* at 1073-80. In direct contravention to its earlier conclusion that no one could have known how EPA interpreted its Silviculture Rule, the Ninth Circuit recognized that EPA has always interpreted its Silvicultural Rule to exclude natural runoff from forest roads from the NPDES permitting system even when that water is collected and channeled in discrete conveyances. *Id.* at 1073-80.

The Ninth Circuit also ruled that EPA's interpretation was reasonable. *Id.* at 1080 ("[T]here are two *possible* readings of the Silvicultural Rule. The first reading reflects the intent of EPA in adopting the Rule." (emphasis added)). Despite this ruling, the Ninth Circuit held that EPA's interpretation of its Silvicuture Rule was "invalid." *Id.*

Although the second reading of the Silvicultural Rule did "not reflect the intent of EPA[,]" the Ninth Circuit ruled that this reading would be consistent with the CWA:

> The second reading does not reflect the intent of EPA, but would allow us to construe the Rule to be consistent with the statute. Under this reading, the Rule exempts natural runoff from silvicultural activities such as those listed, but only as long as the "natural runoff" remains natural. That is, the exemption ceases to exist as soon as the natural runoff is channeled and controlled in some systematic way through a "discernible, confined and discrete conveyance" and discharged into the waters of the United States.

Id. Yet, the Ninth Circuit held that, "[u]nder either reading, . . . the Silvicultural Rule does not exempt from the definition of point source discharge . . . stormwater runoff from logging roads that is collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers. *Id.*

The Ninth Circuit next addressed whether NPDES permits are required for stormwater discharges from forest roads under EPA's Phase I stormwater regulations. *Id.* at 1082-85. The Ninth Circuit recognized that the plain language of these regulations define "'discharges associated with industrial activity'" not to include discharges that are excluded from the NPDES program under the Silvicultural Rule. *Id.* at 1083 (quoting 40 C.F.R. § 122.26(b)(14)). In fact, the Ninth Circuit explained that "[t]he preamble to the Phase I regulations makes clear EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program mandated by § 402(p)." *Id.*; *see also* 55 Fed. Reg. at 48,011. Despite the plain language of the regulations and EPA's clear intent, the Ninth Circuit ruled that EPA's Phase I stormwater regulations are invalid. *Id.* at 1083-85.

Finally, the Ninth Circuit tried to downplay the disastrous effect of its decision:

> Until now, EPA has acted on the assumption that NPDES permits are not required for discharges of pollutants from ditches, culverts, and channels that collect stormwater runoff from logging roads. EPA has therefore not had occasion to establish a permitting process for such discharges. But we are confident, given the closely analogous NPDES permitting process for stormwater runoff from other kinds of roads, that EPA will be

> able to do so effectively and relatively expeditiously.

Id. at 1087. The Ninth Circuit's words were cold comfort because EPA is not a party. Thus, EPA has no obligation to do anything. Amicus Curiae Brief of the United States at 3 n.1, *NEDC v. Brown,* 9th Cir. No. 07-35266 (filed Feb. 10, 2011) ("[A]ny relief afforded to [Respondent] in this case must be limited to the parties and applicable only to the specified discharges before the Court, and cannot directly bind EPA, a non-party."). Thus, fears regarding the disastrous effect of the Ninth Circuit's decision remain.

SUMMARY OF ARGUMENT

This Court should vacate and remand the Ninth Circuit's decision with instructions to dismiss for lack of jurisdiction. The Ninth Circuit's decision abrogates Congress's carefully crafted, bifurcated system that vests exclusive jurisdiction over challenges to EPA's regulation in the courts of appeals. Under the Ninth Circuit's novel and seriously flawed reasoning, a district court may confer jurisdiction on itself over a citizen suit by simply deeming a longstanding EPA regulation ambiguous. Needless to say, this frustrates Congress's intent in passing 33 U.S.C. § 1369(b). More dangerously, the Ninth Circuit's ruling will open the courthouse doors to environmental groups who seek to challenge longstanding EPA regulations under the guise of citizen suits in which EPA is not a party.

ARGUMENT

I. THE PURPOSE OF 33 U.S.C. § 1369(b) IS TO ENSURE PROMPT, AUTHORITATIVE REVIEW OF EPA REGULATIONS IN THE COURTS OF APPEALS.

The judicial-review mechanism in 33 U.S.C. § 1369(b) authorizes interested persons and regulated industries to obtain immediate review in the courts of appeals of certain EPA actions, including the promulgation of NPDES regulations, without waiting for the regulations to be applied in a concrete factual setting.[6] *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992) *see also Shell Oil Co. v. Train*, 415 F. Supp. 70, 76 (N.D. Cal. 1976) (Congress's intent in passing 33 U.S.C. § 1369(b) was to insure prompt, high-level

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[6] Importantly, prompt, authoritative review in the courts of appeals benefits regulated industries, the public, and EPA by providing immediate clarity to all concerned. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978) (By vesting exclusive jurisdiction in the courts of appeals to review EPA's emissions standards under the Clean Air Act, Congress ensured that the "standard[s] would be uniformly applied and interpreted and that the circumstances of [their] adoption would be quickly reviewed by a single court intimately familiar with administrative procedures."); *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985) (Statutory time limits on petitions for review of agency action are jurisdictional in nature. These limitations serve the important purpose of imparting finality into the administrative process, thereby conserving administrative resources. Furthermore, timeliness requirements reflect a deliberate congressional choice to impose statutory finality on agency orders, a choice we may not second-guess." (internal quotations omitted)).

judicial review of the EPA's regulations). Thus, this judicial-review mechanism tends to alleviate prudential ripeness concerns that might otherwise bar judicial review of facial challenges to non-applied regulations. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 891-94 (1990) (a facial challenge to a non-applied agency regulation is "ordinarily" not ripe for review). Congress expressed the importance of immediate review by requiring that review be sought within 120 days of issuance of the regulations, unless the challenge "is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). This provision is the only avenue by which a party may challenge the validity of EPA's NPDES regulations. Collateral attacks on EPA regulations are explicitly barred by 33 U.S.C. § 1369(b)(2), which provides: "Action of the Administrator with respect to which review could have been obtained under [1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

II. THE NINTH CIRCUIT LACKED JURISDICTION TO DETERMINE THE VALIDITY OF EPA'S LONGSTANDING REGULATIONS IN A CITIZEN SUIT.

A. The Ninth Circuit Ignored Binding Precedent And Created A Dual System For Challenging the Validity Of EPA Regulations.

In *E. I. du Pont*, this Court addressed regulations issued by EPA under 33 U.S.C. § 1311, which set

effluent limitations for the discharge of various pollutants from existing plants. 430 U.S. at 115. Numerous companies sought review of the regulations concurrently in both the Fourth Circuit and the Western District of Virginia. The district court dismissed the companies' challenge to the regulations because, under 33 U.S.C. § 1369(b)(1), exclusive jurisdiction was in the Fourth Circuit. *E. I. du Pont de Nemours & Co. v. Train*, 383 F. Supp. 1244, 1256 (W.D. Va. 1974). On appeal, the Fourth Circuit affirmed the district court's dismissal. *E. I. du Pont de Nemours & Co. v. Train*, 528 F.2d 1136, 1139-42 (4th Cir. 1975). As to the companies' original petition for review, the Fourth Circuit ruled that EPA had authority to promulgate regulations establishing effluent limitations for existing plants under 33 U.S.C. § 1311. *E. I. du Pont De Nemours & Co. v. Train*, 541 F.2d 1018 (4th Cir. 1976).

After granting the companies' petitions for writ of certiorari, this Court upheld EPA's asserted authority. *E. I. du Pont*, 430 U.S. at 126-34. As to the jurisdictional issue, this Court rejected the companies' contention that the judicial-review provision in 33 U.S.C. § 1369(b)(1) applied only to EPA's actions in issuing and denying individual permits:

> [The companies'] construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [33 U.S.C. § 1342] but would have no power of direct review of the basic

> regulations governing those individual actions.

Id. at 136.

Later, in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 195 (1980) (per curiam) this Court emphasized that 33 U.S.C. § 1369(b) should be read to effectuate the intent of Congress in ensuring prompt, authoritative resolution of challenges to EPA's actions. At issue was EPA's veto of a NPDES permit issued by California, which had been delegated authority by EPA to administer the NPDES program. *Id.* at 193-94. Because EPA itself had not denied the permit, the Ninth Circuit ruled that it lacked jurisdiction under 33 U.S.C. § 1369(b)(1)(F), which provides for review in the courts of appeals of EPA's actions "in issuing or denying any permit [under 33 U.S.C. § 1342]." *Id.* at 195-96. Recognizing that 33 U.S.C. § 1369(b)(1)(F) would vest the courts of appeals with jurisdiction to review EPA's permit decisions in States that had not been delegated authority to administer NPDES program, this Court reversed:

> [We] hold that the Court of Appeals had jurisdiction over this action under [33 U.S.C. § 1369(b)(1)(F)]. When EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to "den[y]" a permit within the meaning of [33 U.S.C. § 1369(b)(1)(F)]. Under the contrary construction of the Court of Appeals, denials of NPDES permits would be reviewable at different levels of the federal-court

> system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits. . . . Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system.

Id. at 196-97 (footnotes omitted).

As *E. I. du Pont* and *Crown Simpson* demonstrate, the purpose of 33 U.S.C. § 1369(b) is to ensure prompt, authoritative review of EPA's actions, including NPDES-related regulations, in the courts of appeals. Moreover, 33 U.S.C. § 1369(b) should be given a practicable interpretation so as to avoid creating an "irrational" dual system.

Several courts of appeals, including the Ninth Circuit, have recognized that 33 U.S.C. § 1369(b) confers exclusive jurisdiction on the courts of appeals to review the validity of NPDES-related regulations. *E.g.*, *Nat'l Cotton Council v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009) ("The Final Rule before us today . . . regulates the [NPDES] permitting procedures, and we therefore conclude that jurisdiction is proper under § 1369(b)(1)(F)."); *Maier v. EPA*, 114 F.3d 1032, 1037-38 (10th Cir. 1997) (The courts of appeals have exclusive jurisdiction over challenges to EPA's denial of petitions for rulemaking affecting the NPDES program); *American Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992) ("The jurisdictional grant of [33 U.S.C. § 1369(b)(1)(F)] authorizes the courts of appeals "to review the regulations governing the

issuance of permits under section 402, 33 U.S.C. § 1342, as well as the issuance or denial of a particular permit.").

For example, in *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982) the D.C. Circuit, relying on this Court's decisions in *E. I. du Pont* and *Crown Simpson*, ruled that the courts of appeals have jurisdiction under 33 U.S.C. § 1369(b) to review non-technical, NPDES-related regulations. The regulations were – like EPA's Silvicultural Rule and Phase I stormwater regulations – based upon general, policy-based choices made by EPA. *Id.* at 405. Industry groups argued that non-technical, NPDES-related regulations may be challenged only in the district courts. *Id.* at 402-03. In rejecting this argument, the D.C. Circuit noted that "the case for first-instance judicial review in a court of appeals is stronger for broad, policy-oriented rules than for specific, technology-based rules." *Id.* The D.C. Circuit also explained that "[n]ational uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals." *Id.* at 405 n.15 (citing *Virginia Electric & Power Co. v. Costle,* 566 F.2d 446, 451 (4th Cir. 1977)). Finally, the D.C. Circuit – like this Court in *E. I. du Pont* – noted the anomaly that would be created if the courts of appeals could review only EPA's actions in issuing or denying NPDES permits but not the regulations governing those decisions. *Id.* at 405-06.

More recently, in *NRDC v. EPA* an environmental group challenged EPA's Phase I stormwater regulations by filing a petition for review with the Ninth

Circuit. 966 F.2d 1296-97. Before addressing the merits, the Ninth Circuit noted that it had jurisdiction, under 33 U.S.C. § 1369(b), to review the regulations. *Id.* at 1296-97 ("33 U.S.C. § 1369(b)(1)(F) allows the court to review the issuance or denial of a [NPDES] permit. . . . The court also has the power to review rules that regulate the underlying permit procedures." (citing *NRDC v. EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981))).

Here, Respondent also challenged EPA's Phase I stormwater regulations, specifically the regulation that incorporated the Silvicultural Rule. *See NEDC*, 640 F.3d at 1083. However, Respondent did not utilize the judicial-review mechanism in 33 U.S.C. § 1369(b), Instead, Respondent filed a citizen suit in district court, pursuant to 33 U.S.C. § 1365. Thus, the Ninth Circuit should have followed its earlier decision in *NRDC v. EPA* and ruled that it lacked jurisdiction to entertain Respondent's citizen suit. *See Gen. Constr. Co. v. Castro*, 401 F.3d 963, 975 (9th Cir. 2005) ("[W]e are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.").

In this case, the Ninth Circuit ignored not only its own precedent, but the previous decisions of this Court and created a dual system that allows environmental groups to challenge EPA regulations in either the courts of appeals or the district courts. To say that this could result in inconsistent decisions throughout the Nation is an understatement.

To make matters worse, an environmental group can avoid EPA's involvement, as Respondent did here, by naming only the alleged discharger in a citizen suit and styling its challenge to the regulations in terms of an attack on EPA's interpretation thereof. Without EPA in the case to defend its regulations, the environmental group has necessarily increased it odds of prevailing. Moreover, the reviewing court is placed in the unusual position of judging the validity of EPA's regulations without the benefit of the EPA's administrative record for the rulemaking.

This irrational result underscores Congress's wisdom in bifurcating challenges to the validity of regulations from enforcement actions, like citizen suits. As this Court has recognized, the "narrow inquiry" in enforcement actions "is not whether [EPA] has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding." *Adamo Wrecking Co.*, 434 U.S. at 285. Instead, the inquiry is simply whether the defendant violated the regulation. *Id.*

Accordingly, this Court should vacate the Ninth Circuit's decision and remand with instructions to dismiss for lack of jurisdiction, both to correct the irrational dual system created by the Ninth Circuit for challenging EPA regulations and to undo what

amounts to an improper invalidation of EPA's Silvicultural Rule and Phase I stormwater regulations.

B. The Ninth Circuit's Novel And Seriously Flawed Jurisdiction Determination Frustrates Congress's Intent In Passing 33 U.S.C. § 1369(b).

The Ninth Circuit concluded that this case was properly brought as a citizen suit, even though it recognized that courts of appeals have exclusive jurisdiction over challenges to the validity of EPA regulations. *NEDC*, 640 F.3d at 1068. The Ninth Circuit reached this remarkable conclusion by first finding that the Silvicultural Rule is ambiguous because the Rule is "susceptible to two different readings." *Id.* at 1068. Casting a blind eye towards EPA's longstanding and well-publicized interpretation, the Ninth Circuit stated that "there was no way for the public to know which reading of the Silvicultural Rule" EPA would adopt until the United States filed its brief in this case. *Id.* at 1068-69. Finally, the Ninth Circuit determined that Respondent's citizen suit was proper because the case fell "within the exception in [33 U.S.C. § 1369(b)(1)] for suits based on grounds arising after the 120-day filing window."[7] *NEDC*, 640

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[7] This determination was evidently influenced by the United States' amicus curiae brief responding to the Ninth Circuit's jurisdictional questions. *NEDC*, 640 F.3d at 1068. In that brief, the United States simply acquiesced in the Ninth Circuit's ruling that the Silvicultural Rule was ambiguous and

(Continued on following page)

F.3d at 1069. The Ninth Circuit's novel and seriously flawed reasoning requires that this Court vacate the Ninth Circuit's decision and remand with instructions to dismiss for lack of jurisdiction.

First, jurisdiction cannot be dependent on a judicial finding that a regulation is ambiguous, whether that finding is correct or not. It is well established that the existence of a federal court's jurisdiction depends on the facts as they exist when an action is initiated. *Mollan v. Torrance*, 22 U.S. 537, 539 (1824) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought. . . ."). Similarly, jurisdiction may neither be created retroactively, nor conferred on a court by the

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argued that a challenge to an ambiguous EPA regulation could be brought as a citizen suit. Amicus Curiae Brief of the United States at 10-11, *NEDC v. Brown*, 9th Cir. No. 07-35266 (filed Feb. 10, 2011). Ironically, the Ninth Circuit deferred to the United States' jurisdictional argument, although it accorded no deference to EPA's interpretation of its regulations. *NEDC*, 640 F.3d at 1068; *see* Brief for Petitioners, No. 11-338 at 22-31 (explaining that the Ninth Circuit's failure to accord deference to EPA's interpretation of its regulations violated this Court's precedents); Brief for Petitioners, No. 11-347 at 18-50 (same). Yet, a federal court is obligated to determine for itself whether it has jurisdiction and may not defer to an interpretation regarding its jurisdiction proffered by an agency or the United States. *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) ("An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."); *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 846 n.3 (9th Cir. 2008) (agency's position on a federal court's jurisdiction under the CWA is not entitled to deference).

parties. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569, n.4 (1992) (noting that Article III standing may not be created retroactively); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("no action of the parties can confer subject-matter jurisdiction upon a federal court").

Here, the Ninth Circuit reversed this analysis by finding an ambiguity in the Silvicultural Rule and then, based upon that finding, determined that it had jurisdiction over the citizen suit. The Ninth Circuit's analysis is simply backwards. It allows a court to frustrate Congress's intent in passing 33 U.S.C. § 1369(b) by deeming an EPA regulation ambiguous and, thereby, creating its own jurisdiction over a citizen suit.[8] Just as pleading an Article III injury must "be something more than an ingenious academic exercise in the conceivable[,]" *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973), defeating the exclusive jurisdiction of the courts of appeals under 33 U.S.C. § 1369(b) should require more than whether a court can come up with two possible readings of an EPA regulation.

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[8] If allowed to stand, the Ninth Circuit's decision will no doubt entice environmental groups to challenge longstanding EPA regulations in citizen suits and argue ambiguity to avoid the 120-day limitation period in 33 U.S.C. § 1369(b)(1), and limitation periods in other environmental statutes. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (60-day time limit to challenge EPA regulations promulgated under the Clean Air Act).

Second, the Ninth Circuit's suggestion that Respondent could not know which reading of the Silvicultural Rule EPA would adopt until the United States weighed in on this case stretches credulity and is belied by the Ninth Circuit's own decision. In examining the history of the Silvicultural Rule, the Ninth Circuit reviewed EPA's 1976 notice of proposed rulemaking for the Silvicultural Rule. *NEDC*, 640 F.3d at 1074 (quoting 41 Fed. Reg. 6,281-82 (Feb. 12, 1976)). From this notice of proposed rulemaking, the Ninth Circuit was able to discern that EPA's intent was to:

> [C]haracterize discharges of pollutants through a discernible, confined and discrete conveyance as point source discharges only when they were "a result of controlled water used by a person." Under this criterion, the proposed rule named as point source discharges only those related to "rock crushing, gravel washing, log sorting, [and] log storage facilities." Any other silvicultural discharge of pollutants, even if made through a discernible, confined and discrete conveyance, was considered a nonpoint source of pollutants. *In effect, this meant that any natural runoff containing pollutants was not a point source, even if the runoff was channeled and controlled through a "discernible, confined and discrete conveyance" and then discharged into navigable waters.*

Id. at 1074-75 (emphasis added) (internal citations omitted). Importantly, the Ninth Circuit recognized

that EPA made no substantive changes to its proposed Silvicultural Rule when EPA issued the final Silvicultural Rule in 1976 or when it revised it in 1980. *Id.* at 1075-78. Moreover, the Ninth Circuit's characterization of EPA's intent in promulgating the Silvicultural Rule, as discerned from EPA's 1976 notice of proposed rulemaking, was identical to EPA's interpretation of its Silvicultural Rule proffered in this case. United States' Amicus Curiae Brief at 11-17, *NEDC v. Brown,* No. 306-CV-01270 (D. Or., filed Dec. 6, 2006).

The public is generally charged with constructive notice of what is published in the *Federal Register*. 44 U.S.C. § 1507; *see Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) ("the appearance of rules and regulations in the Federal Register gives legal notice of their contents"). Thus, the Ninth Circuit's suggestion that Respondent could not know which reading of the Silvicultural Rule EPA would adopt until the United States filed its amicus curiae brief is specious. The Ninth Circuit figured it out by reading the *Federal Register*. Therefore, the Ninth Circuit erred in ruling that the grounds for Respondent's challenge arose more than 120 days after the challenged regulations were promulgated *See NEDC*, 640 F.3d at 1069. Instead, the Ninth Circuit should have dismissed this case as time-barred.

Finally, even if the Ninth Circuit were somehow correct in ruling that the grounds for Respondent's challenge arose more than 120 days after EPA's

regulations were promulgated, it erred in ruling that that delay somehow changed the proper forum. The discovery of new grounds upon which to challenge an EPA regulation does not create an exception to having to seek judicial review in a court of appeals, it creates an exception to the 120-day limitation period. Indeed, this is evident from the plain language of 33 U.S.C. § 1369(b)(1), which provides that "[r]eview of the Administrator's action . . . may be had by any interested person in [a court of appeals] . . . upon *application*. . . . Any such *application* shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such *application* is based solely on grounds which arose after such 120th day." (Emphasis added). Nothing in this language suggests that an "application" may be filed in the form of a citizen suit in a district court under 33 U.S.C. § 1365. *See Maier,* 114 F.3d at 1038 (When the "challenge is to the substance of a regulation that the agency has already promulgated, exclusive jurisdiction in the court of appeals may not be evaded merely by styling the claim as [something else]."). Thus, contrary to the decision of the Ninth Circuit, the courts of appeals have exclusive jurisdiction over challenges to EPA's regulations, even if the grounds for the challenge arose more than 120 days after the regulations were promulgated.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the Ninth Circuit and remand with instructions to dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

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RECORD AND BRIEFS

Nos. 11-338, 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, *et al.*, *Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *Respondent*.

GEORGIA-PACIFIC WEST, *et al.*, *Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR NATIONAL ALLIANCE OF FOREST OWNERS, FOREST RESOURCES ASSOCIATION, EMPIRE STATE FOREST PRODUCTS ASSOCIATION, FLORIDA FORESTRY ASSOCIATION, GEORGIA FORESTRY ASSOCIATION, LOUISIANA FORESTRY ASSOCIATION, MAINE FOREST PRODUCTS COUNCIL, MICHIGAN FOREST PRODUCTS COUNCIL, MISSISSIPPI FORESTRY ASSOCIATION, NEW HAMPSHIRE TIMBERLAND OWNERS ASSOCIATION, NORTHEASTERN LOGGERS ASSOCIATION, PENNSYLVANIA FOREST PRODUCTS ASSOCIATION, SOUTH CAROLINA FORESTRY ASSOCIATION, VIRGINIA FORESTRY ASSOCIATION, AND WASHINGTON FOREST PROTECTION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief will focus primarily on the jurisdictional issue presented by this case and highlighted in the petition of Doug Decker, in his official capacity as Oregon State Forester, *et al.*, namely:

Was the Ninth Circuit's review of the Silvicultural Rule, 40 C.F.R. § 122.27, and EPA's Phase I rulemaking, 40 C.F.R. § 122.26, jurisdictionally barred by the time limits of 33 U.S.C. § 1369(b)(1), and the further requirement of § 1369(b)(2) that such review may be obtained only in a court of appeals review action to which EPA is a party?

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INTERESTS OF *AMICI CURIAE*[1]

The National Alliance of Forest Owners is a trade association representing owners and managers of over 79 million acres of private forests in 47 states. Its mission is to protect and enhance the economic and environmental values of privately-owned forests through targeted national policy advocacy.

The Forest Resources Association is a trade association concerned with the safe, efficient, and sustainable harvest of forest products and their transport from woods to mill. It represents wood consumers, independent logging contractors, wood dealers, forest landowners, and others with an interest in wood supply chain management.

In addition to the these national organizations, *amici* include the following associations from various forested regions across the country: Empire State Forest Products Association (New York), Florida Forestry Association, Georgia Forestry Association, Louisiana Forestry Association, Maine Forest Products Council, Michigan Forest Products Council, Mississippi Forestry Association, New Hampshire Timberland Owners Association, Northeastern Loggers Association, Pennsylvania Forest Products Association, South Carolina Forestry Association, Virginia Forestry Association, and Washington Forest Protection Association. Each of these

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and no persons other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel for *amici* appeared on behalf of intervenors below but did not participate in drafting their briefs in this Court. Letters of consent for this brief are on file with the Clerk.

organizations has members, including companies, individuals, and families, that work on, own, or manage forest lands in their respective states. These organizations promote stewardship and wise use of forest resources and are dedicated to forest conservation and the sustainable use of natural resources.

Amici have a substantial interest in this case. Their ongoing forestry activities are largely dependent on maintaining forest roads. Ditches and culverts protect forest roads from the destructive effects of precipitation and are, therefore, integral to building and maintaining those roads. Without them, most forest roads would not last long enough to be useful. For more than three decades runoff from those roads has been defined by the Silvicultural Rule, 40 C.F.R. § 122.27, as coming from nonpoint sources, not subject to permitting under Clean Water Act ("CWA") section 402, 33 U.S.C. § 1342. The decision of the Ninth Circuit would for the first time subject forest road maintenance and construction to the permitting process.

Given the need for well-maintained forest roads in aid of silvicultural activities, and the number of forest roads, the Ninth Circuit's decision would require private, state, county, and federal actors that build and maintain roads for timber harvesting to obtain potentially hundreds of thousands (or millions) of section 402 permits. *See* Ex. 1. to Am. Forest Res. Council C.A. Amicus Br.; Am. Loggers Council C.A. Amicus Br. 13. The expansion of the section 402 permitting program resulting from the Ninth Circuit's decision is well-illustrated by comparing the number of permits this decision will require with the 2009 estimate from the U.S.

Environmental Protection Agency ("EPA") that the total universe of discharges then requiring permits (individual or general) was only 400,000. *See* Hanlon Decl. in Supp. of Am. Loggers Council C.A. Amicus Br. ¶ 11. This dramatic expansion will impose significant new costs. *See, e.g.*, Forest Econ Inc., Economic Effects of Point Source Runoff Regulations Estimated for Private Forests of the Pacific Northwest (Dec. 9, 2011), *available at* http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-Northwest.pdf; Profs. Frederick Cubbage and Robert Abt, Potential Administrative and Economic Impacts of NPDES Permit Requirements for Forest Roads in the South (Dec. 7, 2011), *available at* http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-South1.pdf; James W. Sewall Co., Estimated Cost Impacts of Ruling Change for Forest Roads in the State of Maine (Dec. 7, 2011), *available at* http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-Maine-Northeast-Lake-States.pdf.

Beyond the practical effect on silvicultural activities, *amici* also emphasize the broader disruption flowing from the Ninth Circuit's jurisdictional rulings, which are the focus of this brief. Those rulings allow citizen enforcement actions to provide a vehicle for subjecting companies and States to the belated reevaluation of long-established EPA rules on which they and EPA have long and justifiably relied. In this case, judicial review of EPA's rules, through the device of an enforcement action, violated both the statutory time limits, and the mechanism for obtaining review, established by CWA section 509(b), 33 U.S.C. § 1369(b).

STATEMENT

A. EPA's Regulations Have Long Deemed Runoff From Roads Built And Maintained To Support Silvicultural Activities As From A Nonpoint Source, And Thus Not Subject To CWA Permitting.

A foundational requirement of the CWA is that pollutant discharges from "point sources" are prohibited unless granted a permit under section 402, 33 U.S.C. § 1342. *See* 33 U.S.C. § 1311(a). For nearly 40 years, however, EPA has specified that section 402 permits are *not* required for silvicultural rainwater runoff, including from the hundreds of thousands of miles of forest roads that channel runoff from the road through ditches and culverts, because such runoff is "nonpoint source" in nature. EPA's determination is embodied in the two regulations at issue in this case—the 1976 Silvicultural Rule (currently 40 C.F.R. § 122.27) and the 1990 Phase I industrial stormwater regulation (currently 40 C.F.R. § 122.26(b)(14)). Because of these rules, private actors, states, counties, and federal agencies have *not* been required to obtain section 402 permits when they built a road with ditches alongside, installed a culvert, deepened ditches, or extended or moved a forest road used for timber harvesting and related silvicultural activities.

B. Stormwater Runoff From Forest Roads, Including Through Culverts And Ditches, Is From A Nonpoint Source.

The history of the Silvicultural Rule and associated rulemaking, as detailed below, answers the jurisdictional question before the Court.

1. The Silvicultural Rule Made Clear That Runoff Is From A Nonpoint Source.

Shortly after Congress enacted the Federal Water Pollution Control Act ("FWPCA")[2] in 1972, EPA, interpreting its mandate from Congress and citing a range of policy considerations, promulgated regulations excluding from section 402 permitting most "smaller, insignificant agricultural and stormwater discharges (including minor irrigation return flow discharges and runoff from fields, orchards, and crop and forest lands)." *See* 38 Fed. Reg. 18,000 (July 5, 1973) (codified at 40 C.F.R. § 125.4(j)). In doing so, EPA explained that "the Act and legislative history indicate clearly that Congress regarded discharges from agricultural and silvicultural activities as problems to be dealt with primarily through the exercise of authorities concerning nonpoint sources[.]" 38 Fed. Reg. 10,960, 10,961 (May 3, 1973).

This rule was held invalid by the United States District Court for the District of Columbia on the ground that EPA did not have any general authority to exempt entire classes of point sources from the scope of the permitting requirements under section 402. *See Natural Res. Def. Council, Inc. v. Train*, 396 F. Supp. 1393 (D.D.C. 1975). The court suggested as an alternative approach that EPA should exercise its authority under the CWA to define sources that are best regulated as *nonpoint* sources, as Congress contemplated for silvicultural activities. *Id.* at 1401-02.

In reviewing the District Court's decision in *Train*, the United States Court of Appeals for the District of

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[2] This Act was renamed the CWA in 1977. *See* Pub. L. No. 95-217, 91 Stat. 1566 (1977).

Columbia Circuit concluded that "[t]he definition of point source in § 502(14), including the concept of a 'discrete conveyance', suggests that there is room here for some exclusion by interpretation" and thus acknowledged that EPA did, indeed, possess the "power to define point and nonpoint sources." *See Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377, 1382 (D.C. Cir. 1977).

In 1975, EPA exercised that authority and deemed agricultural and silvicultural stormwater runoff—which EPA at times collectively called "rural runoff"—as nonpoint sources, regardless of whether such runoff was channeled through ditches, culverts or otherwise.

Specifically, EPA's 1975 proposal to regulate separate storm sewers announced that "rural storm water runoff," which includes both agricultural- and silviculture-related runoff, should not be subject to section 402 permitting. *See* 40 Fed. Reg. 56,932 (Dec. 5, 1975). EPA explained that "[its] position was and continues to be that most rainfall runoff is more properly regulated under section 208 of the FWPCA, *whether or not the rainfall happens to collect before flowing into navigable waters*." *Id.* (emphasis added). In particular, EPA observed that "[a]gricultural and silvicultural runoff . . . frequently flows into ditches or is collected in pipes before discharging into streams," but it concluded that "most of these sources are nonpoint in nature and should not be covered by the NPDES program." *Id.*; *see also* 41 Fed. Reg. 11,303, 11,305 (Mar. 18, 1976).

Against this backdrop, EPA in 1976 proposed and promulgated the Silvicultural Rule, expressly defining "silvicultural point source" to mean discharges "related to rock crushing, gravel washing, log sorting,

or log storage facilities which are operated in connection with silvicultural activities[.]" 41 Fed. Reg. 24, 709, 24,712 (June 18, 1976).[3] The final 1976 definition of "silvicultural point source" expressly did not include various "nonpoint source activities inherent to silviculture" such as, among others, "road construction and maintenance from which there is natural runoff." *Id.* The proposed Rule, however, did not include "road construction and maintenance" among the "nonpoint source activities." *See* 41 Fed. Reg. 6,281, 6,283 (Feb. 12, 1976).

The preamble to the proposed Rule announced that "ditches, pipes and drains that serve only to channel, direct, and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program." *Id.* at 6,282. It emphasized that "[o]nly those silvicultural activities that, as a result of controlled water use by a person, discharge pollutants through a discernible, confined and discrete conveyance into navigable waters are required to obtain a § 402 pollution discharge permit." *Id.*

When EPA promulgated the final Silvicultural Rule later that year, it again addressed whether stormwater runoff that is collected requires a permit. *See* 41 Fed. Reg. 24,709. Responding to comments on the proposed Rule, EPA explained that "[i]nsofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should also be considered nonpoint in nature[.]" 41 Fed. Reg. at 24,711. Moreover, consistent with this explanation that the channeling of stormwater runoff does not

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[3] EPA codified the current version of the Rule in 1980, but that version differs from the 1976 version only in minor respects. *See* 45 Fed. Reg. 33,290, 33,446-47 (May 19, 1980).

make it from a "point source," EPA revised the Rule as proposed. The Silvicultural Rule now included "road construction and maintenance" in the listing of "nonpoint source activities." EPA explained that although such runoff "falls more generally under the characteristics of nonpoint source pollution, no such reference was made in the proposed regulations." *Id.* Therefore, the Silvicultural Rule made the point explicit.

EPA also promulgated in 1976 a separate rule regarding agricultural activities and defining irrigation return flow ditches used for agricultural or silvicultural activities as "agricultural point sources" subject to section 402 permitting. *See* 41 Fed. Reg. 7,693 (Feb. 23, 1976) (Proposed Rule, Agricultural Activities); *see also* 41 Fed. Reg. 28,493, 28,495 (July 12, 1976) (Final Rule, Application of Permit Program to Agricultural Activities).

Congress enacted CWA amendments in 1977. Significantly, it rejected EPA's decision to include agricultural return flows in "point source" as too broad. Congress amended "point source" to *exclude* "return flows from irrigated agriculture." 33 U.S.C. § 1362(14). In overriding EPA's definition of agricultural point source as too broad, Congress did not disturb any of the instances in which EPA had already found silvicultural and agricultural activities to be nonpoint source in nature, such as in the Silvicultural Rule.

As described above, in promulgating the Silvicultural Rule, EPA stated that stormwater runoff from forest roads, whether channeled or not, is not subject to CWA permitting. Nonetheless, no interested parties challenged the Silvicultural Rule in a court of appeals within the filing period under 33

U.S.C. § 1369(b). The Rule became law and remained law.

In the many years after promulgation, EPA had occasion to restate its view that channeled runoff from forest roads is not subject to permitting. EPA published a "Notice of Regulatory Interpretation" in the Federal Register in 1990 confirming that when it promulgated the Silvicultural Rule, "EPA concluded that discharges such as these (e.g., runoff from orchards and forest lands), although sometimes channeled, were non-point source in nature. They were caused solely by natural processes, including precipitation and drainage, were not otherwise traceable to any single identifiable source, and were best treated by non-point source controls." 55 Fed. Reg. 20,521, 20,522 (May 17, 1990) (emphasis added). Similarly, in considering whether to revise the Silvicultural Rule in 1999, EPA again declared that runoff from forest road construction or maintenance, among other silvicultural activities "is categorically excluded from the NPDES program," 64 Fed. Reg. 46,058, 46,077 (Aug. 23, 1999), and EPA ultimately declined to revise the Rule. *See* 65 Fed. Reg. 43,586, 43,652 (July 13, 2000). EPA expressed the same position in various litigation-related briefs including those filed in this case. *See, e.g.*, Br. of Fed. Appellees, *Newton Cnty. Wildlife Ass'n v. Rogers*, No. 97-1852, at 40-42 (8th Cir. filed Sept. 8, 1997); Pet. App. 86a-87a, 91a; Pet. App. 113a-116a; 1JA 22, 39.

2. EPA's Phase I Stormwater Regulations Likewise Clarified That Stormwater Runoff Is From A Nonpoint Source.

In 1987, Congress amended the CWA to address stormwater more effectively, employing what has come to be called a Phase I and Phase II regulatory

structure. For Phase I, section 402(p) was amended to state that permits "shall not [be] require[d] . . . for discharges composed entirely of stormwater" prior to October 1, 1994, with the exception of five categories of stormwater discharges, notably including those "associated with industrial activity." *See* 33 U.S.C. § 1342(p)(1)-(3).

In addition, Congress directed EPA to consider in Phase II whether other types of stormwater discharges should also be subject to regulation, given "the nature and extent of pollutants in such discharges." *See id.* § 1342(p)(5)-(6).

EPA promulgated its Phase I stormwater regulations in 1990. *See* 55 Fed. Reg. 47,990 (Nov. 16, 1990). In those regulations, EPA defined discharges "associated with industrial activity" to refer only to discharges "directly related to manufacturing, processing or raw materials storage areas at an industrial plant" and "immediate access roads" at such facilities. 40 C.F.R. § 122.26(b)(14). Nothing in the regulations provides that runoff from "harvesting operations" in the forest, *i.e.*, logging, fits within this definition. Moreover, EPA stated that its Phase I permit requirement would "not include discharges from facilities or activities excluded from the [permitting] program under this Part 122 [which includes the Silvicultural Rule]." *See* 40 C.F.R. § 122.26(b)(14); *see also* 55 Fed. Reg. at 48,011. EPA thus specified that, under the stormwater rules, previously excluded silvicultural activities, in the event a discharge occurred, were again excluded.

The regulatory definition of "associated with industrial activity" contains a reference to Standard Industrial Classification ("SIC") 24. *See* 40 C.F.R. § 122.26(b)(14)(ii); *see also* 2JA 65-71. EPA's reason

for including that reference was to require permits for "sawmills . . . and other mills engaged in producing lumber and wood basic materials" because such facilities could be expected to contain potential pollution sources such as "storing raw materials . . . [or] waste products . . . or chemicals outside." 55 Fed. Reg. at 48,008. It did not intend, with that reference, to encompass silvicultural activities in the forest itself, such as stormwater runoff from logging. *See* 55 Fed. Reg. at 48,011. It agreed with comments urging exclusion of such runoff from Phase I permitting, emphasizing that runoff is better controlled through best management practices. Thus, the "definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under [s]ection 402," such as stormwater runoff from forest roads. *See id.*

EPA's decision that such activities are outside of Phase I could have been subject to judicial review at the time of promulgation. Notwithstanding timely petitions to review the Phase I regulations, EPA's decision on forest roads emerged unchallenged and unscathed. *See Am. Mining Cong. v. EPA*, 965 F.2d 759 (9th Cir. 1992); *Natural Res. Def. Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992).

In 1999 EPA declined to subject forest road runoff even to Phase II regulation, a conclusion that the Ninth Circuit ultimately directed EPA to explain and which remains under consideration. *See Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003).

C. The Decisions Below.

1. The District Court Properly Held That Plaintiff's Claims Were Barred By the Silvicultural Rule.

In 2006, Northwest Environmental Defense Center initiated in district court this citizen suit enforcement action under 33 U.S.C. § 1365 against the Oregon State Forester, a number of other State officials, and various timber companies. The suit alleged that defendants violated the CWA by not obtaining Section 402 permits for stormwater runoff from logging roads. The district court had little difficulty concluding that the challenged failure to obtain Section 402 permits for sediment runoff from forest roads did not violate the CWA. In its view, the Silvicultural Rule made it clear that such runoff did not involve point source discharges and thus was beyond the reach of Section 402 permitting requirements. *See* Pet. App. 48a-68a.[4]

2. The Ninth Circuit Concluded, In An Enforcement Proceeding, That Longstanding EPA Rules Can Be Reinterpreted To Conform To The Court's Reading Of The CWA.

The Ninth Circuit took a very different tack. It declined to accept EPA's view of what the Silvicultural Rule meant. After a lengthy recitation of

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[4] In so holding, the district court followed a conventional approach, consistent with other courts, concluding that under the Silvicultural Rule, forest road rainwater runoff is from a "non-point" source, and thus no permits were required. *See Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998); *Sierra Club v. Martin*, 71 F. Supp. 2d 1268 (N.D. Ga. 1996).

the Rule's history, in which the court repeatedly acknowledged that EPA defined stormwater runoff from forest roads to be nonpoint source, *even when the runoff is channeled and collected* (Pet. App. 16a-28a), the Ninth Circuit abruptly concluded that the Rule was actually ambiguous on whether "collected, channeled, and discharged" runoff is a point source discharge. *See* Pet. App. 32a-33a.

The Ninth Circuit took the view that if runoff channeled through culverts and ditches was deemed to be from a nonpoint source, that would be inconsistent with *the court*'s understanding of the CWA and could not be the right reading of the Rule. But because the Rule was capable of an alternate reading, albeit one that "does not reflect the intent of EPA," the court adopted that alternate reading in order to "construe the Rule to be consistent with the statute." Pet. App. 32a. The court thus held that "the Silvicultural Rule does not exempt from the definition of point source discharge . . . stormwater runoff from logging roads that is collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers." *Id.* The Ninth Circuit did not explain how its freshly-minted interpretation of the Rule could be reconciled with the principles of *Auer v. Robbins*, 519 U.S. 452 (1997), which require deference to an agency in interpreting agency regulations.[5] It purported to "save" EPA's Rule for EPA by giving it a meaning that EPA neither intended nor requested.

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[5] Nor did the Ninth Circuit articulate why EPA's interpretation of ambiguous terms such as "nonpoint source" did not warrant deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The Ninth Circuit then turned to whether runoff from forest roads is subject to CWA permitting under the Phase I regulations, concluding that such runoff involves "discharges associated with industrial activity" under 33 U.S.C. § 1342(p)(2)(B), as defined by EPA itself. The Ninth Circuit seized on the regulation's reference to SIC 24, declaring that "[i]t is undisputed that 'logging,' which is covered under SIC 2411 (a subset of SIC 24), is an 'industrial activity.'" Pet. App. 39a. In so doing, it overrode EPA's contemporaneous explanation that the SIC 24 reference did not encompass activities in the forest. It also overrode EPA's explanation in this case that it had excluded and intended to exclude silvicultural activities, such as logging and associated road maintenance and construction, from its definition of industrial activity.

D. The Ninth Circuit's Jurisdictional Theory.

Petitioners sought rehearing and rehearing *en banc*. The court, at that point, ordered the parties to address its jurisdiction in light of 33 U.S.C. § 1369(b), which provides that: (i) judicial review of certain EPA actions must be sought in an appropriate court of appeals within 120 days from the date of determination, approval, promulgation, issuance, or denial, unless based on grounds arising more than 120 days after the action; and (ii) any such challenge that could have been brought under § 1369(b) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." On May 17, 2011, the court denied rehearing and issued a replacement opinion, adding a brief discussion of subject matter jurisdiction. *See* Pet. App. 5a-7a.

The court rested its jurisdictional analysis on two points. First, it stated that it had not invalidated the

Silvicultural Rule, but merely interpreted it, thus removing it from § 1369(b)'s province. On the one hand, the Rule could be read in a manner consistent with EPA's contemporaneous statements concerning its scope and with EPA's statements in its initial *amicus* brief, to provide that stormwater runoff from forest roads is categorically deemed nonpoint source. On the other hand, the Rule might be read not to reach stormwater runoff through culverts and ditches. In adopting the second view, the court claimed it was simply interpreting, not invalidating the Rule.

Second, the Ninth Circuit stated that "the government first adopted its interpretation of the Rule in its initial amicus brief in this case." This allowed the court to declare that "this case comes within the exception in § 1369(b)(1) for suits based on grounds arising after the 120-day filing window." Pet. App. 7a. The court did not discuss whether this case was filed in the appropriate court.

The Ninth Circuit did not consider whether § 1369(b) posed any bar to its review of the Phase I stormwater regulations.

SUMMARY OF ARGUMENT

1. CWA section 509(b) requires that judicial review of certain EPA actions, such as the rules at issue in this case, proceed against EPA in a court of appeals within 120 days after promulgation, unless the grounds for the challenge arise later. *See* 33 U.S.C. § 1369(b)(1). A determination that a rule's intended scope as described by EPA at the time of promulgation is inconsistent with the CWA is one that *could have* been obtained under §1369(b)(1). Such a ruling therefore cannot be obtained later in

enforcement proceedings, as 33 U.S.C. §1369(b)(2) makes clear. The Ninth Circuit exceeded its jurisdiction by reinterpreting the Silvicultural Rule 35 years later to conform it to its view of what the CWA required, namely, CWA permits for channeled stormwater runoff from forest roads. That ostensible "interpretation," contrary to EPA's stated explanation of the Rule at the time of promulgation, effectively invalidated the Rule as written, *see Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573, 581 (2007). This was impermissible for the following reasons:

First, at the time of promulgation, EPA explained that forest road construction and maintenance giving rise to stormwater runoff, whether channeled or not, does not require CWA section 402 permits. This explanation, and EPA's position on subjecting silvicultural activity to permitting, was not ambiguous. Any affected party who believed that the Rule was inconsistent with the CWA could have sought judicial review at that time, but no petition was filed within the statutory window. Decades later, in an enforcement proceeding to which EPA was not a party, the Ninth Circuit forced a new interpretation upon the Rule to conform it to the court's current view of the CWA. The court's "interpretation" therefore amounts to an invalidation of the Rule as written, an outcome that § 1369(b)(2) forbids in a citizen suit enforcement action because review "could have been" obtained at the time of promulgation.

Second, the Ninth Circuit based its "interpretation" solely on the theory that its intended meaning was irreconcilable with the court's understanding of the CWA. That is exactly the kind of issue that could be presented under § 1369(b).

Third, in purporting to save the Rule by emasculating it, the Ninth Circuit did not "interpret" it in any ordinary sense. It ignored all of the ordinary rules of interpretation and showed no observable deference to EPA's express and consistently held views about the meaning of its own authority and regulation.

2. The Ninth Circuit further erred by allowing this citizen suit enforcement action to become the vehicle for reviewing EPA's determination that channeled stormwater runoff from forest road construction and maintenance is not subject to permitting under EPA's Phase I regulation. Such judicial review could have been, but was not, timely obtained in a § 1369(b) suit in court of appeals. *See Am. Mining Cong.*, 965 F.2d 759; *Natural Res. Def. Council*, 966 F.2d 1292. EPA made clear as *amicus* that irrespective of the independent effect of the Silvicultural Rule in defining certain activities as "nonpoint source," EPA did not regard forest road maintenance or construction to be "industrial activity" under its Phase I rules. Even if the Ninth Circuit could properly conclude that its "interpretation" of the Silvicultural Rule undermined the premise of EPA's exclusion of forest road construction and maintenance from the Phase I rules, this is assuredly a matter for EPA to consider in the first instance. Moreover, as a matter of Phase I rulemaking, it is a matter that should be reviewed in a section 509 proceeding, not in a citizen suit.

ARGUMENT

I. The Ninth Circuit Exceeded Its Jurisdiction In Overriding The Contemporaneously Announced Meaning Of The Silvicultural Rule Under The Guise Of Interpreting The Rule.

EPA rules are subject to judicial review through timely proceedings against the Agency in the courts of appeals under 33 U.S.C. § 1369(b). Judicial review of EPA rules, or EPA's announced interpretations of its rules, is not well-suited to citizen suit enforcement actions in which the Agency is not even a party. If the scope of a rule was announced at the time of promulgation, and left unchallenged, affected parties can then rely on that rule, as it has become law, and remains immune from judicial review in enforcement actions. Because the rules at issue here—including EPA's contemporaneously announced interpretation of its rules—could have been reviewed at the time of promulgation under section 509(b), that is when and how they should have been considered by the courts, if at all.

A. If Review Of An EPA Rule "Could Have Been Obtained" In A Circuit Court of Appeals Under Section 509(b), Such Review May Not Be Obtained Through A Citizen Suit Enforcement Action.

Section 509(b)(1) of the CWA sets forth the means, and the time within which, a wide range of EPA actions and rules are subject to judicial review. It provides that review of specified EPA determinations, approvals, promulgations, issuances, or denials "may be had by any interested person in [a] Circuit Court of Appeals of the United States" and that "[a]ny such

application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1).

It is well-established that review provisions, such as section 509(b), that establish jurisdiction in the courts of appeals "should be construed in favor of review by the court of appeals." *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004) (citing cases from four circuits). Consequently, section 509(b) has been construed broadly to encompass a wide range of EPA rulemakings, including the Phase I regulations—which were, in fact, challenged under section 509(b)—and regulations providing for exclusions from section 402 permitting like the Silvicultural Rule. *See, e.g.*, *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (challenge to rule exempting discharges of oil and gas construction activities); *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (challenge to rule exempting direct pesticide application from permitting); *Natural Res. Def. Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (challenge to EPA's Phase I regulations); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992) (same); *Natural Res. Def. Council v. EPA*, 673 F.2d 400, 403-06 (D.C. Cir. 1982) (challenge to EPA's "consolidated permit regulations," 40 C.F.R. parts 122-25). Moreover, this Court has observed the "truly perverse" situation that would arise if "courts of appeals would review numerous individual actions issuing or denying permits pursuant to § 402 but would have no power of direct review of the basic regulations governing those individual actions." *E. I. du Pont de Nemours* v. *Train*, 430 U.S. 112, 136 (1977). Consequently, the

agency rules at issue in this case fall squarely within the class of agency actions subject to the requirement of timely challenge in a court of appeals under section 509(b). No party argued in the Ninth Circuit that the Silvicultural Rule (or the Phase I rule) was a form of agency action outside the scope of section 509(b).

Section 509(b)'s prohibition on *collateral* challenges to EPA rules is emphatic: "Action of the Administrator with respect to which review could have been obtained under [§ 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2). This Court has interpreted an identically worded prohibition within the Clean Air Act to mean that "any agency action that was reviewable in the courts of appeals cannot be challenged in an enforcement proceeding, whether or not review was actually sought." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 605 (1980) (interpreting 42 U.S.C. § 7607(b)(2)); *accord Natural Res. Def. Council*, 673 F.2d at 406 (under 33 U.S.C. §§ 1369(b)(1) and 1369(b)(2), "one who wishes to challenge an action of the Administrator must, if the action is held to be within the categories of section 509(b)(1), do so within [120] days or lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties").

With section 509(b), just as with similar exclusive review provisions in other environmental statutes, Congress "struck a careful balance between the need for administrative finality and the need to provide for subsequent review in the event of unexpected difficulties." *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1975); *see also Tex. Mun. Power Agency v. EPA*, 836 F.2d 1482, 1484 (5th Cir. 1988). Ultimately, Congress chose to "limit the

availability of judicial review of a standard or requirement where judicial review was available at the time the standard or requirement was established." S. Conf. Rep. 92-1236 at 148 (Sept. 28, 1972).

Statutes such as section 509(b) serve interests arguably even more important than finality, though finality is important enough. They ensure that review takes place in a court of appeals, in a challenge against the agency, which has a fair chance to defend its rule. Such challenges allow for binding nationwide determination about the validity of agency rules. Moreover, in a court of appeals review proceeding, other interested parties have the opportunity to contribute to the defense of (or assault on) the rule. By contrast, collateral citizen suit attacks on agency regulations risk inconsistent results and uncertainty as to the effect of judicial decisions on the agency and non-parties.

Considerations of fairness, estoppel, or even due process *might* temper the application of the jurisdictional bar of section 509(b) when the bar is raised by the enforcing agency against, for example, a company or State that claims no knowledge of the rule or chance to contest it. Those tempering considerations have no application where, as here, it is the *enforcing party* that seeks to circumvent the jurisdictional bar.

The basic intent underlying section 509(b) is unmistakable: Congress wanted to ensure that challenges to the actions of EPA be timely presented in a court of appeals review action directed against EPA, allowing EPA to defend its actions. Challenges to EPA regulations that could have been brought earlier in a section 509 proceeding are not properly

maintained in enforcement actions initiated long after a rule's promulgation, and to which EPA may not even be a party.

B. The Ninth Circuit's Transformative Construction Of The Silvicultural Rule Effectively Invalidated That Rule, A Remedy That Could Only Have Been Obtained Through A Rulemaking Challenge Under Section 509(b).

It is, of course, correct that section 509(b) poses no bar to the interpretation of an ambiguous rule. Respondents will apparently seek to defend the Ninth Circuit's jurisdiction on that basis, *i.e.*, this was simply a matter of interpreting an ambiguous regulation. *See* Br. in Opp. 21-26 (cert stage).

But it is equally clear that there are limits to what may properly be deemed interpretation, rather than implicit invalidation, of a rule. *See Duke Energy Corp.*, 549 U.S. at 581 ("[W]e have to see the Court of Appeals' construction of the 1980 PSD regulations as an implicit invalidation of those regulations, a form of judicial review implicating the provisions of § 307(b) of the Act, which limit challenges to the validity of a regulation during enforcement proceedings when such review 'could have been obtained' in the Court of Appeals for the District of Columbia within 60 days of EPA rulemaking."). The "interpretation" by the Ninth Circuit is every bit as much an implicit invalidation of the Silvicultural Rule as was the interpretation in *Duke Energy*. Three points make this clear:

First, the "interpretation" that the Ninth Circuit adopted was flatly inconsistent with EPA's explanation of the rule, and its intended scope and applica-

tion, *at the time of promulgation*. Thus, review "could have been obtained" then.

Second, the sole support for the Ninth Circuit's "interpretation" was its view that EPA's longstanding statement of the scope of the Rule was irreconcilable with the true meaning of the CWA. Such judicial analysis is properly performed in a section 509 action in which EPA is a party.

Third, the Ninth Circuit's method of "interpretation" wreaks havoc with ordinary principles of interpreting administrative regulations. The Ninth Circuit failed to afford the agency's views any deference under *Auer*.

We address these three points in turn.

1. *The Ninth Circuit's Analysis Could Have Occurred When The Rule Was Promulgated, As Part Of A Rulemaking Challenge, And Is Barred Now.*

As demonstrated above, and as acknowledged by the Ninth Circuit throughout most of its opinion, Pet. App. 16a-28a, its "interpretation" of the Silvicultural Rule was a concise rejection of the understanding of that Rule that EPA announced at the time of promulgation and maintained continuously for 35 years. *See, e.g.*, 41 Fed. Reg. at 6,282; *id.* at 24,711; Pet. App. 32a-33a.

Indeed, most of the Ninth Circuit's opinion correctly described the Silvicultural Rule as defining stormwater runoff from forest roads as "nonpoint source," whether channeled through ditches and culverts or not. *See* Pet. App. 16a-28a. Citing the text and EPA's explanatory statements in the preambles to the proposed Rule, *see* 41 Fed. Reg.

6,281, and to the final Rule, *see* 41 Fed. Reg. 24,709, the Ninth Circuit repeatedly stated that the Rule treated stormwater runoff from forest roads as nonpoint source, *even if channeled*. *See, e.g.*, Pet. App. 20a, 22a, 27a.

In acknowledging this history, the Ninth Circuit conceded what was irrefutable. The preamble to the proposed Rule declared that "ditches, pipes and drains that serve only to channel, direct, and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program." 41 Fed. Reg. at 6,282. Responding to comments on the proposed rule, EPA ultimately emphasized that "[i]nsofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should also be considered nonpoint in nature." 41 Fed. Reg. at 24,711. As detailed above, there was nothing obscure about the point at all. It was specified in the rule-making and, for good measure, described as a reflection of EPA's expressed approach to silvicultural (and agricultural) activities. *See* pp. 6-8 *supra*.

Given the clear contemporaneous statements of what the Rule means, anyone who believed that channeled runoff from forest roads involve point sources that must be permitted under Section 402, "could have" sought review under Section 509(b)(1) within 120 days of the Rule's promulgation, and therefore was required to seek such review.

The point was succinctly stated in the second *amicus* brief that the United States filed in the Ninth Circuit in this case:

> If EPA states its interpretation at the time it promulgates the regulation (e.g., in an accompanying Federal Register preamble), a potential

> plaintiff must accept EPA's interpretation as authoritative and challenge the regulation directly and in a timely fashion. . . . Otherwise, Section 1369(b)'s purposes would be completely subverted by allowing a court to reject EPA's interpretation in a later citizen suit.

1JA 58-59. That point is determinative here. Because the issues analyzed by the Ninth Circuit could have been presented in a section 509(b) action when EPA promulgated the Rule, this citizen suit cannot be the vehicle for affording the Rule a contrary interpretation decades later.

2. The Ninth Circuit Rested Its Decision Solely On Its View Of The Meaning Of The CWA.

The Ninth Circuit concluded that a Rule deeming runoff channeled through ditches or culverts to be nonpoint source would be inconsistent with the CWA. *See* Pet. App. 32a. Having so concluded, the Ninth Circuit forced an interpretation on the Rule—contrary to its contemporaneously described scope—to conform it to the court's current view of the CWA. Yet a finding of inconsistency between the governing statute and a regulation promulgated under its authority is precisely the kind of issue that can and should timely be determined as part of a rulemaking challenge in a court of appeals, to which the agency is a party present to defend its views.

By its own terms, the Ninth Circuit's rationale for affording the Rule this miraculous saving interpretation rests on a shaky foundation. It is true enough that statutes are interpreted to render them consistent with the Constitution, when possible. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566,

2594 (2012). But even that venerated canon of construction has its limits and "does not supplant traditional modes of statutory interpretation[;]" thus, courts "cannot ignore the text and purpose of a statute in order to save it." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008).

Moreover, the rationale that supports an interpretive canon that seeks to conform statutes to the Constitution does not necessarily extend to the relationship between regulations and statutes. To the contrary, regulations are routinely reviewed and invalidated, as appropriate, if inconsistent with the statute. *See, e.g.*, *Rowan Cos. v. United States*, 452 U.S. 247, 263 (1981); *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1373, 1375 (D.C. Cir. 2007). In the context of a rulemaking challenge, they are not automatically given a "saving interpretation" unless, perhaps, if the agency asks for it during the review process. Instead, they are invalidated, and the issue is remanded to the agency for further consideration.

While it is, of course, appropriate, and perhaps inevitable, that one would consider the meaning of a statute in interpreting a regulation under that statute, that approach has its limits. The regulation should not be given a saving interpretation that supplies a meaning to the regulation that is flatly inconsistent with what the agency intended or seeks. If section 509(b) is to have any meaning, any preference for "saving" a regulation through interpretation rather than invalidating it cannot provide a path around section 509(b) if—as is the case here—the point at issue "could have been" timely raised in a proper proceeding commenced at the time of promulgation.

The Ninth Circuit's interpretation of the Rule rested entirely on an asserted inconsistency with the CWA. That inconsistency could have been timely raised when the Rule was promulgated. It is too late 35 years later.

3. *The Ninth Circuit's "Interpretation" Is Inconsistent With Basic Methods Of Interpreting A Regulation.*

The Ninth Circuit's view that it merely interpreted the Silvicultural Rule is also irreconcilable with its disregard of the usual methods for interpreting agency regulations. It is true that the Ninth Circuit's refusal to defer to EPA's interpretation, and to provide a proper basis for overriding that interpretation, is itself impermissible and could independently require reversal—a point that other parties, briefing the merits of this case, have made. Here, however, as in *Duke Energy*, the Ninth Circuit's disregard for ordinary principles of interpretation is emblematic of the similar disregard for the jurisdictional limitations of section 509(b).

To begin with, under *Auer*, 519 U.S. at 461, an agency's interpretation of its own rule is to be given "controlling weight" unless that interpretation is "plainly erroneous or inconsistent with that regulation." *Accord Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007). Yet here the Ninth Circuit failed to afford *Auer* deference to EPA's longstanding construction of its Rule. Such deference is to be denied in certain circumstances, *see Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012), but there was no reason to deny it here.

As explained above, EPA had from the outset believed that Congress had not wanted it to subject

forest road runoff to CWA permitting, viewing such runoff as best addressed by state and local authorities under 33 U.S.C. § 1288. In promulgating the Silvicultural Rule, EPA was explicit that ditches, pipes, and drains that merely collect stormwater runoff from logging roads are nonpoint in nature and are thus not subject to permitting. *See* p. 7-8 *supra* (quoting preambles to the proposed and final rules). EPA defined nonpoint source (undefined in the CWA) to include "natural runoff", and "natural runoff" to include channeled rainwater.

This view was consistently held. As the United States explained in the *amicus* brief filed early in this case, "EPA has consistently interpreted the term 'natural runoff' as synonymous with all 'runoff from precipitation events,'" and "EPA has made it clear that the term 'natural runoff' in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts."[6] 1JA 37, 39; *see also* Pet. App. 114a ("[S]ystems for the control of precipitation through ditches, culverts and the like . . . are an integral part of forest roads and reading them as outside the scope of the regulation does not make sense because it defeats the plain language of the regulation."). The correctness of these statements is evident from numerous regulatory actions and litigation briefs filed by EPA over the course of decades. *See* pp. 9-10 *supra*.

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[6] The consistency of EPA's interpretation renders inexplicable the Ninth Circuit's conclusion and the Solicitor General's assertion that EPA did not articulate the scope of the Silvicultural Rule until an *amicus* brief in this litigation.

At bottom, there is nothing unusual about EPA's view that building a ditch or using a culvert to channel stormwater and maintain a forest road—rather than let the rainwater create its own ruts, ditches and washes, effectively taking the road with it—does not convert what is, at bottom, simply stormwater runoff, into a point source subject to CWA permitting.

Even looking only at face the Silvicultural Rule, with the barest of context for orientation, the Ninth Circuit's conclusion that the Rule is capable of two different readings is a stretch. The Rule states that road construction and maintenance from which there is natural runoff is a nonpoint source silvicultural activity. Under the Ninth Circuit's saving "interpretation," the Rule applies to forest road maintenance and construction only where there is no channeling of the runoff through ditches, culverts, or other conveyances—a rare circumstance, if roads are to exist after a rainstorm. The notion that the Rule was necessary to clarify that rainwater diffusely coming off a road does not give rise to the need for a permit hardly seems necessary. The Ninth Circuit's reading thus trivializes the Rule and renders it largely irrelevant.

As a matter of plain language, the Rule as written defined most silvicultural activities as nonpoint source. It defined "silvicultural point source" to mean "discernible, confined and discrete conveyance[s] related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters." 40 C.F.R. § 122.27. To all appearances, this definition was exclusive, and it did not include building

forest roads with ditches and culverts. While this specification might be treated as non-exclusive, the nature of the defined point sources—discernible, confined and discrete conveyances "as a result of controlled water use by a person," 41 Fed. Reg. at 6,282—bear no resemblance to ditching and culverting a road that is subject to rainfall and runoff.

In sum, under ordinary principles of interpretation—without resort to the claimed supervening inconsistency with the CWA—the Ninth Circuit's "interpretation" of the Silvicultural Rule did not stand a chance.[7] This was no ordinary interpretation, but rather an implicit invalidation of the Rule.

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The Ninth Circuit's effort to impose its interpretation of the Rule, based solely on its view of the CWA, in the face of EPA's stated understanding of the Rule's scope, implicitly invalidated that Rule. Because judicial review on that theory could have been obtained at the time of promulgation, it is barred by 33 U.S.C. § 1369(b).

C. The Ninth Circuit's Theory That Its Jurisdiction Was Proper, And The Appeal Timely, Because Of New Grounds Fits Neither The Facts Nor The Law.

The Ninth Circuit concluded that "this case comes within the exception in § 1369(b)(1) for suits based on

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[7] For all of these same reasons, EPA's interpretation of the Silvicultural Rule is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

grounds arising after the 120-day filing window." *See* Pet. App. 6a-7a. It drew its support for that theory from a footnote in an *amicus* brief of the United States suggesting that the first time EPA had interpreted the Silvicultural Rule to define forest road runoff through ditches and culverts as nonpoint source was in a brief filed earlier in this very case. *See id.* With that reasoning, the Ninth Circuit erred twice.

First, it accepted the United States' demonstrably wrong suggestion that the interpretation of the Silvicultural Rule at issue had appeared for the first time in this litigation—a suggestion belied by EPA's contemporaneous statements at the time of promulgation, and a long history subsequent. *See* pp. 6-9 *supra*.

Second, the Ninth Circuit ignored that even suits based on grounds arising after the 120-day filing window cannot be brought as citizen suit enforcement actions under 33 U.S.C. § 1365(a). The grounds arising after exception in § 1369(b)(1) only overcomes the *time bar* in the statute. It does not open the door to challenging rules through a district court citizen suit, or other enforcement action, rather than in a challenge in an appropriate court of appeals. *See* 33 U.S.C. § 1369(b)(2).[6]

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[6] Nor did the Ninth Circuit explain how purported new grounds that arose *during the pendency* of a citizen suit enforcement action provided jurisdiction *at the time the citizen suit was filed.*

II. The Ninth Circuit Compounded Its Error By Rejecting EPA's Construction Of Its Phase I Stormwater Regulations And Again Allowing A Citizen Suit Enforcement Action To Displace EPA's Rulemaking Authority.

The Ninth Circuit compounded its error by failing to hold that section 509(b) likewise barred this citizen suit as a vehicle for reviewing EPA's determination that forest road maintenance and construction involving runoff through culverts and ditches ought not be subject to Phase I regulation under 33 U.S.C. § 1342(p).

The Ninth Circuit's failure to recognize that judicial review should have been obtained under section 509(b) is easily illustrated. In the cases challenging EPA's Phase I rulemaking, no one challenged the decision to exclude forest road construction and maintenance from the Phase I regulations. *See Am. Mining Cong.*, 965 F.2d 759; *Natural Res. Def. Council*, 966 F.2d 1292.

In contrast, *reflecting the way that section 509(b) judicial review is supposed to occur*, various groups did assert that EPA's failure to include forest roads in the Phase II process was inconsistent with the statute. *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 860-63 (9th Cir. 2003). The Ninth Circuit reviewed the challenge and ruled that the issue must be reconsidered by the EPA; a process and remedy in complete accord with section 509(b).[9] *See id.*

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[9] In conceding that this approach was procedurally and jurisdictionally proper, *amici* do not concede that it was substantively correct. Indeed, a decision by this court upholding the Silvicultural Rule would preclude any effort by EPA to

In promulgating its Phase I regulations, EPA stated that the term "associated with industrial activity" "does not include discharges from the facilities or activities excluded from the NPDES program under this part 122," *e.g.*, under the Silvicultural Rule. 40 C.F.R. § 122.26(b)(14). By the time of the 1990 Phase I regulations, EPA's conclusion that natural rainwater runoff remains nonpoint source in nature, even if channeled through culverts and ditches, was longstanding, well-understood, and oft-repeated. *E.g.*, 40 Fed. Reg. at 56,932, 56,934; 41 Fed. Reg. at 6,282; *id.* at 24,711. Indeed, in 1990, just months before promulgating the final Phase I regulations, EPA reaffirmed the scope of the Silvicultural Rule. *See* 55 Fed. Reg. at 20,522. Therefore, if there was a viable challenge to be made to EPA's determination that runoff from forest road maintenance and construction was not properly subject to Phase I regulation, the time to make that assertion was within 120 days of promulgation as part of the rulemaking challenge.

Nonetheless, having shot down the Silvicultural Rule's definition of forest roads with ditches and culverts as nonpoint sources—thus pretty much all of them—the Ninth Circuit went on to consider EPA's Phase I rulemaking as part of this citizen suit enforcement action.

With the 1987 CWA amendments, Congress had given EPA broad discretion to determine whether stormwater discharges are industrial and how best to regulate non-industrial stormwater discharges. *See* 33 U.S.C. § 1342(p). As described above, EPA made

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regulate forest roads under the point source provisions of section 402(p)(6).

clear that it did not regard actions excluded from permitting under the Silvicultural Rule as properly subjected to Phase I regulation. As *amicus* in this case, EPA had clarified that *even apart from the independent impact of the Silvicultural Rule*, and its definition of point source, it did not believe that forest road maintenance could properly be considered industrial activity. 1JA 42-44; Pet. App. 123a-127a. Timber harvesting activity, including the use of forest roads, taken at a distance from any industrial plant is more akin to agriculture than "industrial activity." This was, in EPA's view, reflected in the regulations. The operative definition of "storm water discharge associated with industrial activity" applied by EPA in Phase I—referring to discharges from "industrial plants," 40 C.F.R. § 122.26(b)(14)—was not on its face broad enough to reach forest roads used for logging.

Nonetheless, the Ninth Circuit leaped into the fray, again substituting its view for that of EPA, affording EPA no deference under *Auer*. It held that notwithstanding EPA's contrary view—and notwithstanding that EPA had explicitly relied on its own understanding of the scope of Silvicultural Rule itself to implement that view—forest roads with culverts are subject to permitting under EPA's Phase I regulations.

The Ninth Circuit's rationale was that EPA's regulation references SIC 24 in defining industrial activity, and it is "undisputed that 'logging,' which is covered under SIC 2411 (part of SIC 24), is therefore an 'industrial activity.'" *See* Pet. App. 39a-40a. But this analysis bypassed EPA's own statements—at the time of promulgation and in its first *amicus* brief to the Ninth Circuit—that the reference to SIC 24 was

not intended to encompass runoff from roads used for logging and that EPA did *not* view most silvicultural activity as industrial. *See* 1JA 42-43 (explaining that the reference to SIC 24 was intended to capture "traditional *industrial* sources such as sawmills").

As parties addressing the merits have demonstrated, the Ninth Circuit had no warrant to displace EPA's considered judgment on this issue.

The more important point for purposes of this brief, which focuses on jurisdiction, is that this was not the time nor the forum in which to address the issue. Even if the Ninth Circuit's unexpected "interpretation" of the scope of the Silvicultural Rule could be said somehow to nullify the basis for EPA's decision to exclude runoff from Phase I regulation, reopening the issue, the proper course was to allow *EPA* to consider whether such runoff was nonetheless non-industrial. EPA could do so *sua sponte* or in response to a rulemaking petition from Respondent. Indeed, an important judicial interpretation of the Silvicultural Rule's scope (such as that rendered by the Ninth Circuit, if it were sustained), in a manner contradicting the basis of EPA's decision to exclude silvicultural runoff from Phase I regulation, would seem, even without further agency action, to fit within section 509(b)'s proviso for later review by a court of appeals based on after-occurring circumstances. In any event, the issue could be addressed, and should be addressed, by EPA, and reviewed in a section 509(b) action, not an enforcement action to which EPA is not a party.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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GEORGIA-PACIFIC WEST, INC., *et al.*,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

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QUESTION PRESENTED

Whether the Ninth Circuit should have deferred to the Environmental Protection Agency's longstanding position that channeled runoff from forest roads is exempt from the Clean Water Act's National Pollutant Discharge Elimination System permitting regime?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) submits this brief amicus curiae in support of Petitioners Georgia-Pacific West, Inc., *et al.*

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs

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[1] Counsels of record have consented to the filing of this brief. Petitioners and Respondents have filed blanket consents to all amicus filings with the Clerk of Court, and amicus NFIB Legal Center has given the parties timely notice of our intention to file in this matter. In accordance with Rule 37.6, the NFIB Legal Center states that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The Legal Center files in this case because the scope of federal authority under the Clean Water Act concerns small business owners. Moreover, small business owners are concerned about the possibility that litigants might bring future challenges along these lines against federal regulations which currently allow business practices. Accordingly, we seek to file in this case to offer a constitutional rule of statutory construction, which should help this Court determine when it is appropriate to defer to an agency's interpretation.

SUMMARY OF ARGUMENT

This case concerns the scope and proper application of the Clean Water Act (CWA), and subsequent amendments to the CWA. According to Respondents, the Petitioners violated the CWA by constructing, maintaining and using forest roads for timber-harvesting operations. Respondents argue that Petitioners must obtain National Pollutant Discharge Elimination System (NPDES) permits from the Environmental Protection Agency (EPA) to continue to use and maintain these roads because they were constructed with a corresponding drainage system, which channels rainfall into streams and rivers. The EPA disagrees with Respondent's interpretation of the CWA. The agency promulgated

the Silvicultural Rule, 40 C.F.R. § 122.27, to exempt construction, maintenance and use of forest roads from the NPDES regime.

Since the text of the CWA is ambiguous, *Chevron USA v. Natural Resource Defense Council*, 467 U.S. 837 (1984), provides that courts should defer to reasonable interpretations from the EPA. This does not vest the EPA with unbridled discretion to resolve ambiguities in any conceivable manner. The agency's interpretation must be *reasonable*, and must comport with the background principles of our constitutional system.

In this case, the EPA's Silviculture Rule deserves *Chevron* deference because the agency provided a reasoned explanation for exempting timber harvesting operations from NPDES permitting requirements consistent with the principles of federalism entailed in the Ninth and Tenth Amendments. These amendments safeguard the prerogative of the states to establish policies allowing economic activities and the rights of citizens to exercise their liberties unrestrained in the absence of legitimately enacted federal or state law. States are presumed to retain autonomy to address local concerns, and citizens are presumed to be at liberty to act as they so choose, in the absence of an *unambiguous* federal abridgement of state powers and individual rights. In sum, it would be unreasonable to resolve an ambiguity in the manner that Respondents advocate. Such an interpretation would contravene the principles ensconced in the Ninth and Tenth Amendments.

ARGUMENT

I. CHEVRON DEFERENCE IS CONSTRAINED BY THE BACKGROUND PRINCIPLES OF CONSTITUTIONAL LAW

This case concerns ambiguity in the Clean Water Act. Federal Water Pollution Control Act, 33 U.S.C. § 1362 (2008) (CWA). Respondents' proffered interpretation would extend the CWA to restrict economic activities currently allowed under local and state law. *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1066-1067 (9th Cir. 2011). Amicus NFIB Legal Center cautions against this interpretation because it improperly presumes both federal preemption and abrogation of economic liberties. Instead, we maintain that the Court should endorse the Environmental Protection Agency's (EPA) interpretation, as codified in the Silviculture Rule because it appropriately conforms to the principles of federalism, and the concept of retained rights ensconced in the Ninth and Tenth Amendments.

This Court has repeatedly emphasized the importance of grounding judicial review on the "first principles" of constitutional law when addressing a questionable assertion of federal authority. *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles."); *Medellin v. Texas*, 552 U.S. 491, 494 (2008) (noting that the court cannot "set aside first principles."). Accordingly, this Court should consider whether the background principles of our constitutional system constrain the scope of

permissible constructions of the ambiguous provisions at issue in this case. Specifically, the Court should consider whether the Ninth and Tenth Amendments set forth an overarching rule of construction.

a. *Chevron* Recognized that Agency Interpretations are Constrained by the Background Principles of Law and Reason

Chevron USA v. Natural Resource Council, 467 U.S. 837 (1984) (*Chevron*), held that courts should defer to an agency's reasonable interpretation of an ambiguous federal statute. *Christensen v. Harris County*, 529 U.S. 576, 586-587 (2000). But, this does not give an agency free-rein to adopt any interpretation it prefers. *Chevron*, 467 U.S. at 843-844 (The agency cannot adopt an interpretation that is "arbitrary, capricious, or manifestly contrary to statute."). *Chevron* deference is not paramount to rational basis review or judicial abdication. *See Pelofsky v. Wallace*, 102 F.3d 350, 355 (8th Cir. 1996); *see also* Peter J. Smith, *Pennhurst, Chevron, and the Spending Power*, 110 Yale L.J. 1187, 1195 (2001); David B. Edwards, *Out of the Mouth of States: Deference to State Action Finding Effect in Federal Law*, 63 N.Y.U. Ann. Surv. Am. L. 429, 449 (2008).

Chevron and its progeny recognize that judicial deference is inappropriate where the agency's interpretation is based on an unreasonable construction of the statute. *Chevron*, 467 U.S. at 843 ("[T]he question for the court is whether the agency's

[interpretation] is based on a permissible construction of the statute.") (emphasis added). The agency's construction must address an ambiguity and must represent a non-arbitrary or capricious interpretation based on an acceptable statutory construction. *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 411 (2008) (citing *Chevron* for the proposition that the "EEOC may include additional elements in its definition [of the term 'charge'], as long as they are reasonable constructions of the statutory term..."); *see also Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1307 (11th Cir. 2011) ("As a general rule, an agency's interpretation of a statute which it administers is entitled to deference if the statute is silent or ambiguous and the interpretation is based on a reasonable construction of the statute.").

The *Chevron* doctrine is grounded in respect for the separation of powers, but it must also conform with other fundamental tenants of our constitutional system. While *Chevron* emphasized that "[t]he Court need not conclude that the agency construction was the only one it permissibly could have adopted[,]" this does not preclude a reviewing court from rejecting interpretations which contravene other constitutional principles. *See Edward DeBartolo Corp. v. Florida Gulf Coast Bldg. and Trade Council*, 485 U.S. 568, 575 (1988) (invoking cannon of constitutional avoidance in *Chevron* analysis); *see also United States v. Mead Corp.*, 533 U.S. 218, 228 FN 6 (2001) (observing that the reasonableness of an agency's interpretation rests in part on constitutional principles). Indeed, the rules of reason and our fundamental

constitutional precepts necessarily cabin the scope of permissible agency constructions. *See U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1231 (10th Cir. 1999) (a construction raising constitutional problems is not reasonable); *see also How Chevron Step One Limits Permissible Agency Interpretations: Brand X and the FCC's Broadband Reclassification*, 124 Harv. L. Rev. 1016, 1027-1028 (2011) (*Chevron* step two considers whether the permissible scope of acceptable interpretations has been "cabined").

b. Any Reasonable Statutory Interpretation Must Conform to the Background Principles Established in the Ninth and Tenth Amendments

The Ninth and Tenth Amendments establish an overarching rule of construction which must inform any reasonable construction of an ambiguous federal statute. Specifically, federal law does not preempt state policies except if it is manifestly clear that Congress intended to effect preemption. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) ("In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'") (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). An intrinsically intertwined corollary principle holds that individuals are at liberty to act in accordance with local and state law, unless federal law holds otherwise. *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the

liberties that derive from the diffusion of sovereign power.") (internal quotation marks omitted). These presumptions of state autonomy and individual liberty are properly understood as constitutional rules of construction. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597, 714 (2005).

i. The Ninth Amendment Established a Rule of Construction

In the ongoing endeavor to ascertain the objective meaning of the Ninth and Tenth Amendments, it is necessary to consider recently discovered historical evidence.[2] This is particularly true with regard to the Ninth Amendment, which was largely dismissed as a "constitutional irrelevance" in the early-mid twentieth century. Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 Tex. L. Rev. 1, 2 (2006). "[T]his enigmatic provision has received an outpouring of serious scholarly attention over the past twenty years." *Id.* at 3. In all propriety, newly discovered lost historical evidence, as to the meaning of this text, should be considered in assessing whether the Ninth Amendment should have application in a case of this nature. *See* Seth Rokosky, *Denied and*

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[2] Historical evidence may be particularly helpful in elucidating the commonly understood meaning of the constitutional text at the time of ratification. *See e.g., District of Columbia v. Heller*, 554 U.S. 570, 579-610 (2008) (discussing historical evidence to shed light on the original meaning of the Second Amendment). Therefore, it is only appropriate to reassess our understanding of the Constitution as legal scholars and historians uncover previously lost or forgotten documents.

Disparaged: Applying the 'Federalist' Ninth Amendment, 159 U. Pa. L. Rev. 275, 334 (2010) (synthesizing recent originalist scholarship and suggesting the Court should rehabilitate the Ninth Amendment in order to "strengthen protections of state sovereignty and bolster them with text.").

Originally understood, the Ninth and Tenth Amendments were meant to operate together. Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 Iowa L. Rev. 801, 854 (2008) (noting that James Madison and early commentators referred to the Ninth and Tenth Amendments as the "twin guardians of federalism"). They were intended to preserve the liberties of the people and the political autonomy of the states. Barnett, *The Ninth Amendment: It Means What it Says*, *supra* at 4. Rokosky *supra* at 285. That intent is reflected in the plain language of the amendments.

The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const., Amend IX. By its plain language, the Ninth Amendment requires that the Constitution should "not be construed" as abrogating those inherent "rights" which the founding generation believed to be natural to all men. Randy E. Barnett, Restoring the Lost Constitution, 54-55 (Princeton University Press, 2004). Indeed the framers intended just what the text suggests.

The historical record is clear. The Ninth amendment was "solely concerned with

constitutional interpretation." Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 340-341 (2004). As James Madison explained in a 1789 speech opposing the creation of a national bank, "the purpose of the Ninth [Amendment] was to 'guard[] against a latitude of interpretation.'" Lash, *Lost Jurisprudence of the Ninth Amendment*, supra at 601 (citing James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), James Madison, Writings 437, 489 (Jack N. Rakove ed. 1999) ("Rakove"). Specifically, the drafting committee and proponents intended to placate both federalist and antifederalist concerns by constitutionalizing a rule of construction in the Ninth Amendment to preserve state autonomy and individual rights.[3]

The very structure of the Ninth Amendment presupposes that individuals retain their natural liberties in the absence of a validly enacted state or

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[3] "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against." James Madison, Speech in Congress Proposing Constitutional Amendments, (June 8, 1789), *in* Rakove *supra* at 448.

federal law.[4] Barnett, Restoring the Lost Constitution, *supra* at 60. This reflects the revolutionary generation's predominant conviction that individuals are naturally at liberty, and that they only give up those liberties necessary to attain the security and benefits of a governed society. *See e.g.*, Letter to Congress (Sept. 17, 1787), in 2 The Records of the Federal Convention of 1787, at 666 (Max Farrand ed., 1911).[5] There is abundant documentation in the historical record evincing the fact that the "retained" rights [mentioned in the Ninth Amendment] referred to natural rights..."[6] Barnett, Restoring the Lost Constitution, *supra* at 54-55. Yet the Ninth Amendment did not set out to

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[4] In providing that the people "retain" rights against the federal government, the Ninth Amendment constitutionalized the Lockean concept that individuals are naturally free and that their rights precede the formation of the Constitution. Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 Cato Sup. Ct. Rev. 13, 15 (2009-2010).

[5] ("Individuals entering into society must give up a share of liberty to preserve the rest... [But] [i]t is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be preserved.").

[6] For example, one of the early drafts of the bill of rights explicitly stated that "[t]he people have certain natural rights which are *retained* by them when they enter into Society..." Roger Sherman's Draft of the Bill of Rights, reprinted in The Rights Retained by the People: The History and Meaning of the Ninth Amendment, 351 (Randy E. Barnett ed., 1989). This concept of "retained" natural rights was eventually incorporated into the final text of the Ninth amendment. *See* Madison's Notes for Amendment Speech, 1789, *in* 1 Rights Retained, supra at 64 (Madison's notes for an early speech on the Bill of Rights used the phrase "natural rights retained"); *see also* 2 Annals of Cong. 1944 (1791) (Statement of Rep. Madison, Feb. 2, 1791) ("Bank Speech").

specifically define our rights. Instead, in saying that our rights were "retained", the amendment offers a simple rule of construction—a presumption of liberty. Barnett, Restoring the Lost Constitution, *supra* at 259-300.

ii. The Presumptions of Liberty and State Autonomy Must Inform any Reasonable Construction an Ambiguous Statute

In compliment to the Ninth Amendment's explicit rule of construction, the Tenth Amendment was to preserve the retained powers of the states and the people. Barnett, *The Ninth Amendment: It Means What it Says*, *supra* at 4 ("[T]he cumulative effect of the available historical evidence suggests strong support for the individual rights and federalism models."). Together these two amendments were intended to make explicit the understanding that federal powers are limited, along with the corollary constitutional presumptions that individuals retain their natural rights, and that states maintain their traditional sovereign powers, unless and until the federal government legitimately enacts positive law to curtail the exercise of those rights or powers. *See* James Madison, Bank Speech *supra* at 1949, 1951. This original understanding was lost in the early twentieth century. Lash, *Lost Jurisprudence of the Ninth Amendment*, *supra*

at 714.[7] Nonetheless, our Tenth Amendment jurisprudence now incorporates the Ninth Amendment's rule of construction. *Id.* at 714 ("Even if their source has been forgotten, the principles enshrined in the Ninth Amendment continue to inform the Supreme Court's construction of the Constitution.").

The Tenth Amendment proclaimed that states kept their traditional sovereign powers. This is the fundamental tenant of our federalist system. Absent an unambiguous assertion of preemptive federal authority, states retain the prerogative to regulate, *or to allow*, conduct in whatever manner best suits local priorities, concerns and sensibilities. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (there must be a demonstrably clear and manifest intent to preempt). It is therefore unreasonable to resolve ambiguous language in a federal statute as obviating the state's autonomy to address local issues in accordance with the best judgment of state policymakers. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (preemption can only be inferred where it is clear "that Congress 'left no room' for supplementary state regulation'" or where "'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'") (internal citations

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[7] ("The Madisonian reading of the Ninth Amendment was echoed by Justice Story in Houston v. Moore, [18 U.S. (5 Wheat.) 1, 49 (1820),] the first Supreme Court discussion of the Ninth Amendment. Story's reading of the Ninth Amendment as a rule of construction preserving the retained rights of the states initiated a jurisprudence that would last more than a century.").

omitted). Simply put, the default presumption favors the state's local prerogative. *Rice*, 331 U.S. at 230.

Likewise, individuals are presumed to be at liberty. The principles of federalism protect *both* state autonomy and individual rights. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Indeed, the Tenth Amendment reserves non-delegated powers "to the states respectively, or to the people." *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2576 (U.S. 2012); *see also United States v. Comstock*, 130 S. Ct. 1949, 1971 (2010) (Thomas, J., dissenting). Accordingly, our Tenth Amendment jurisprudence recognizes that individuals retain ultimate sovereignty.[8] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people by whom and for whom all government exists and acts."); *Chisolm v. Georgia*, 2 U.S. 419 (2 Dall.), 468 (1793) ("The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government."). As such, an ambiguous federal statute cannot reasonably be interpreted as impeding a citizen from freely exercising her liberties any more than it can be presumed as

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[8] Randy E. Barnett, *Commandeering the People: Why the Individual Mandate is Unconstitutional*, 5 NYU J. L. & Liberty 581, 627-628 (2010) ("[T]he sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State... [A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country...'") (quoting Chief Justice John Jay).

obviating state autonomy. *See Bond*, 131 U.S. at 2364. This background principle of residual autonomy is textually grounded in the Ninth and Tenth Amendments. *See* James Madison, Bank Speech *supra* at 1949, 1951.

II. THE SILVICULTURE RULE CONSTITUTES A REASONABLE CONSTRUCTION AND SHOULD BE AFFORDED DEFERENCE BECAUSE IT PRESERVES ECONOMIC LIBERTIES AND STATE AUTONOMY

a. The CWA is Ambiguous, and Respondents Cannot Overcome the Presumptions of Liberty and Autonomy

The first step in considering whether EPA's Silviculture Rule should be entitled to *Chevron* deference is to look to the CWA's text—applying the traditional rules of statutory construction—to see if Congress has definitively spoken to the issue. *Duncan v. Walker*, 533 U.S. 167, 172 (2001) ("We begin, as always, with the language of the statute"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foun., Inc.*, 484 U.S. 49, 56 (1987). But, we must begin this analysis with the presumptions of liberty and reserved autonomy in mind. Since the Ninth and Tenth Amendments confirm that individuals retain their natural liberties and residual sovereignty on entering society, the party asserting an abridgement bears the burden of demonstrating that Congress legitimately and unambiguously enacted supreme

law to curtail individual rights. *See Rice*, 331 U.S. at 230; *Bond*, 131 S. Ct. at 2364.

In this case, Respondents assert that Petitioners violated the CWA in failing to obtain an NPDES permit when constructing, maintaining and using forest roads. While there is no question—under modern Commerce Clause jurisprudence—that Congress could regulate these activities if it choose to, it is unclear whether Congress intended to do so here. The CWA's text provides no definitive answer. The plain language could potentially be understood as either requiring Petitioners to obtain an NPDES permit, or exempting them from that requirement. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 989 (2005) (Recognizing ambiguity in the term "offering" because the statute did "not unambiguously require" Respondent's preferred interpretation, but could instead be understood in different ways).

Specifically, ambiguity stems from the definition of the term "point source." 33 U.S.C. § 1362(14). The CWA requires individuals to obtain an NPDES permit for any discharge from a *point source* into the waters of the United States. *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003); 33 U.S.C. § 1342. The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit... from which pollutants are or may be discharged." 33 U.S.C.A. § 1362(14). But, it also expressly states that the term "does not include

agricultural stormwater discharges and return flows from irrigated agriculture." *Id.* As such, it is ambiguous whether the drainage ditches in this case should be understood as point sources. Since Petitioners constructed the ditches for timber-harvesting, the ditches may be subject to the agricultural stormwater discharge exception. The American Heritage dictionary defines "agriculture," as entailing the growing of crops, but does not clarify whether this should specifically include the harvest of timber. *See* American Heritage dictionary (defining "agriculture" as "[t]he science, art, and business of cultivating soil, producing crops, and raising livestock; farming");[9] *but see* John Gifford, Practical Forestry 12 (1907) ("silviculture is a branch of agriculture").

Likewise, there is ambiguity as to the meaning of the phrase "associated with industrial activity." 33 U.S.C. § 1342(p)(1)-(3). The 1987 CWA amendments specify that NPDES permits are not required for stormwater discharges, except for those *associated with industrial activity*. *Id.* It is unclear whether this includes the construction, maintenance and use of forest roads. Indeed, the term "industrial" might be understood as pertaining only to manufacturing facilities, or might be interpreted much more broadly to entail any and all business ventures. *See* American Heritage Dictionary (While offering multiple definitions of "industry," the American Heritage Dictionary defines the term as pertaining to manufacturing precisely in the context

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[9] *Available online* at http://ahdictionary.com/word/search.html?q=agriculture (last visited Aug. 27, 2012).

of a regulatory scheme; specifically the definition provides that "industry" is "[t]he sector of an economy made of manufacturing enterprises: government regulation of industry.").[10]

Since the dictionary definitions of the key terms in these sections are ambiguous, it is necessary to resort to other cannons of statutory construction and extrinsic indicia of congressional intent to determine whether discharges associated with timber harvesting activities clearly require NPDES permits. *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012) ("In order to determine whether a statute clearly shows the intent of Congress in a *Chevron* step-one analysis, we employ traditional tools of statutory construction and examine 'the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.') (*citing Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000). The Ninth Circuit recounted a long and muddled legislative history, from which it concluded that Congressional intent requires NPDES permits for discharges associated with the construction, maintenance and use of forest roads. *Brown*, 640 F.3d at 1070-1085. Yet an objective assessment must conclude that Congress failed to make its intent clear.

"Legislative history can never produce a 'pellucidly clear' picture... of what a law was 'intended' to mean, for the simple reason that it is

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[10] *Available online* at http://ahdictionary.com/word/search.html?q=industry (last visited Aug. 27, 2012).

never voted upon..." *Zuni Public School Dist. No. 89 v. Dept. of Educ.*, 550 U.S. 81, 117 (2007) (Scalia dissenting). Indeed the only thing that we can be sure of is what the CWA actually says, and we cannot read anything more or less into the text than what "we know for certain both Houses of Congress (and the President if he signed the legislation) agreed upon..." *Id.* Since extrinsic aids of this sort are inherently unreliable and particularly susceptible to the subjective predilections of reviewing judges, it is only proper, in cases like this where divining congressional intent amounts to conjecture and extrapolation, to conclude that Congress simply failed to make clear any intent to regulate Petitioner's conduct. *Id.* ("[W]hat judges believe Congress 'meant' (apart from the text) has a disturbing but entirely predictable tendency to be whatever judges think Congress must have meant, *i.e.*, should have meant."); *see also Chevron*, 467 U.S. at 862 (Finding the "legislative history as a whole silent on the precise issue..." and concluding "[w]e are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress."). In short, Respondents have failed to meet their burden of offering compelling and incontrovertible evidence of congressional intent, and have therefore failed to overcome the presumptions of liberty and reserved autonomy.

Since the proper scope and application of the CWA remain ambiguous, it is necessary to move to the second step of the *Chevron* test to determine whether EPA's interpretation is reasonable. *Brand X*, 545 U.S. at 997 ("[S]ilence suggests... that the Commission has [reasonable] discretion to fill the

consequent statutory gap."). Congress charged EPA with responsibility for enforcement and has delegated authority to make reasonable interpretive decisions under the Act. *See Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 202 (D.C. Cir. 1988). Accordingly, EPA's Silviculture Rule deserves deference if it represents a reasonable construction of the statute. *See Mayo Foundation for Medical Educ. and Research v. U.S.*, 131 S. Ct. 704, 716 (2011) (Deferring to an agency's interpretation when Congress had not directly spoken to the issue because the agency's "rule [was] a reasonable construction of what Congress ha[d] said...").

b. EPA's Interpretation is Reasonable and Entitled to Deference Because it Comports with the Presumptions of Liberty and Autonomy

In this case, the State of Oregon established Best Management Practices (BMPs) to govern timber harvesting activities. OR. Rev. Stat. §§ 527.765(1), (2). Oregon's BMPs allow for the construction, maintenance and use of forest roads with corresponding drainage systems. In the judgment of the state's policymakers, these practices best manage stormwater runoff from forest roads. Or. Admin. R. § 629-625-0000(3). This approach protects the environment and appropriately encourages timber harvesting—a staple of the regional economy. *Id.* Oregon chose not to adopt a permitting regime like EPA's NPDES program. But, Respondents take issue with the balance the state had adopted between environmental stewardship and economic liberty. They argue that ambiguity in

the CWA should be resolved—in contravention of the best judgment of Oregon's policymakers—to require individuals to obtain federal NPDES permits in order to continue constructing, maintaining and using forest roads. *Brown*, 640 F.3d at 1067.

EPA disagrees with Respondent's interpretation of the CWA. 40 C.F.R. § 122.27. For over 35 years, EPA has consistently construed the CWA as allowing states to address stormwater runoff through the adoption of BMPs. The agency interprets the CWA to exempt discharges associated with timber harvesting activities from the NPDES permit regime. *Brown*, 640 F.3d at 1073-1085. EPA and Petitioners advance several reasons for EPA's interpretation, including EPA's conclusion that forest road runoff is "better controlled through the utilization of best management practices" at the state level. *Id.* at 1075. EPA's Silviculture Rule is also justified on the fact that associated discharges are "induced by natural processes, including precipitation" and are "not traceable to any discrete and identifiable facility." 41 Fed. Reg. 24710 (June 18, 1976). To be clear, we do not take issue with any of these justifications; however, we submit that the constitutional rule of construction and the principles of federalism, ensconced in the Ninth and Tenth Amendments, are of paramount importance in any reasonable construction of the Act because they concern the fundamental tenants of our constitutional system.

EPA's proffered interpretation constitutes a reasonable construction of the ambiguous provisions because it preserves Oregon's autonomy to allow

timber harvesting activities under the specific conditions that it has imposed. It also allows the unrestrained exercise of economic liberties in the absence of a clear and unambiguous assertion of preemptive federal authority. *See Rice*, 331 U.S. at 230; *see also* James Madison, Bank Speech *supra* at 1949, 1951 (arguing that the Ninth Amendment entailed a rule of construction). First, any reasonable construction of the CWA must take into account the Act's structure, which necessarily leaves room for the states to play a coordinate role with the federal government in managing water and environmental issues. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 493 (9th Cir. 1984) ("The general regulatory picture... is one of congressionally intended cooperation and collaboration between... the combined federal/state regulatory authorities under the CWA."); *see also Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894, 903 (9th Cir. 2011) ("In amending the CWA... Congress recognized that states, not the federal government, would regulate nonpoint sources of pollution."). Second and more fundamentally, the Tenth Amendment preserves Oregon's power to establish regulatory policies in accordance with local concerns and to allow economic practices subject to those policies, except to the extent those policies may be preempted by federal law. *Bond*, 131 S. Ct. at 2364 ("The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society...'").

Since preemption is not presumed, ambiguity in the CWA cannot reasonably be construed as extending federal authority in a manner that obviates Oregon's policy choices. *See Hammond*, 726

F.2d at 493 (recognizing that the CWA preempts state policies only to the extent they are in clear conflict). Finally, the Ninth Amendment's rule of construction provides that citizens are presumed to retain economic liberties in the absence of legitimately enacted law curbing their exercise. Lash, *The Lost Jurisprudence of the Ninth Amendment*, *supra* at 714 (The Ninth Amendment has been incorporated into the idea of federalism); *Bond*, 131 S. Ct. at 2364 ("Federalism secures the freedom of the individual."). Accordingly, it would be unreasonable to construe ambiguous language in the CWA as abrogating Petitioner's right to conduct business in accordance with local and state law. That right is presumed to be "retained," absent an unambiguous exercise of contrary federal authority under the Supremacy Clause. *See* Barnett, Restoring the Lost Constitution, *supra* at 259-300. Therefore, the ambiguity must be resolved—as Petitioners and the EPA interpret the CWA—so as to preserve Oregon's prerogative to manage stormwater runoff under the state's BMPs, and to allow Petitioners to continue constructing, maintaining and using forest roads without further regulatory requirements.

CONCLUSION

This Court should reverse the Ninth Circuit and hold that Petitioners are not required to obtain NPDES permits for channeled forest road run off.

Respectfully submitted,

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Nos. 11-338, 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, *et al.*,
Petitioners,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,
Respondents.

GEORGIA-PACIFIC WEST, INC., *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND COUNCIL OF STATE GOVERNMENTS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

The *amici curiae* are as follows:

The National Governors Association ("NGA"), founded in 1908, is the collective voice of the nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating

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[1] The parties have consented to the filing of this *amicus curiae* brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

and developing the professional management of local governments throughout the world.

The Council of State Governments ("CSG") is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The *amici* represent various state and local governmental organizations that have an interest in the proper implementation of the Clean Water Act ("CWA"). The CWA provides for federal regulation of point source discharges and for state and local regulation of nonpoint source discharges. The U.S. Environmental Protection Agency's ("EPA") Silvicultural Rule interprets the CWA as providing that stormwater runoff from forest lands, with exceptions not relevant here, is a nonpoint source discharge subject to state and local regulation. The Ninth Circuit, however, disregarded the EPA's Silvicultural Rule, and instead interpreted the CWA as providing that such stormwater runoff is a point source discharge subject to federal regulation, if the runoff has been channeled rather than flows naturally. In the *amici*'s view, the Ninth Circuit should have deferred to the EPA's Silvicultural Rule, under this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), rather than interpreting the statute *de novo* as providing that channeled stormwater runoff from forest lands is a point source discharge. State and local governments frequently own logging roads and regulate nonpoint

source discharges. Therefore, the *amici* have a significant interest in this case.

STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act ("CWA") prohibits an unauthorized "discharge of a pollutant," 33 U.S.C. § 1311(a), which is defined as an "addition" of a "pollutant" to "navigable waters" from a "point source," *id.* at § 1362(12). The CWA establishes the National Pollutant Discharge Elimination System ("NPDES"), which authorizes the U.S. Environmental Protection Agency ("EPA") to issue a permit for the discharge of a pollutant from a "point source." *Id.* at § 1342(a). The NPDES thus regulates discharges from point sources. Under the CWA, discharges from nonpoint sources are regulated by the states under their own laws. *Id.* at §§ 1288, 1314(f), 1329; *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002); *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998).

In 1976, the EPA adopted a regulation—the Silvicultural Rule—defining a point source and nonpoint source in the context of silvicultural stormwater runoff. The Rule defines a "[s]ilvicultural point source" as including four specific silviculturally-related facilities—rock crushing, gravel washing, log sorting, and log storage facilities—when such facilities discharge pollutants into waters of the United States. 40 C.F.R. § 122.27(b). The term does not, however, include "non-point source silvicultural activities" from which "there is natural runoff." *Id.* In adopting the Rule, the EPA explained that although a point source is defined in the CWA as a "discernible, confined and discrete conveyance, including but not

limited to any pipe, ditch [or] channel," a "proper interpretation" of the CWA is that "ditches, pipes and drains that serve only to *channel*, direct, and convey nonpoint runoff are not meant to be subject to the § 402 permit program." 41 Fed. Reg. 6,281, 6,282 (1976) (emphasis added). Thus, the Silvicultural Rule provides that silvicultural stormwater runoff is a nonpoint source discharge—except in specific enumerated situations not applicable here—regardless of whether the runoff is channeled or flows naturally.

In 1987, Congress enacted the Water Quality Act of 1987, which extends the NPDES to stormwater discharges. 33 U.S.C. § 1342(p). The 1987 Act requires the EPA to adopt regulations for five categories of stormwater discharges, including stormwater discharges "associated with industrial activity." *Id.* at § 1342(p)(2). The EPA subsequently adopted regulations for stormwater discharges, which provide *inter alia* that the term "industrial activity" "does not include discharges from facilities or activities excluded from the NPDES program under Part 122." 40 C.F.R. § 122.26(b)(14). The reference to Part 122 includes 40 C.F.R. § 122.27(b), which, as noted above, provides that silvicultural stormwater runoff is generally considered a nonpoint source rather than a point source discharge. Thus, the EPA's stormwater regulations do not change the EPA's Silvicultural Rule, which provides that silvicultural stormwater runoff is a nonpoint source discharge regardless of whether it is channeled or flows naturally.

SUMMARY OF ARGUMENT

This *amicus* brief sets forth the following arguments:

1. The Ninth Circuit held that silvicultural stormwater runoff is a *point source* discharge under the Clean Water Act ("CWA")—and thus subject to regulation under the National Pollutant Discharge Elimination System ("NPDES")—if the runoff is channeled rather than flows naturally. On the contrary, the CWA provides that silvicultural stormwater runoff, even when channeled, is a *nonpoint source* discharge subject to regulation under state and local laws. Since Congress authorized state and local governments to regulate nonpoint sources of pollution, there is no basis for the Ninth Circuit's concern that silvicultural stormwater runoff will be unregulated and the CWA's goals impaired unless such runoff is held to be a point source discharge subject to regulation under the NPDES. Moreover, the CWA defines a "point source" as *not* including "agricultural stormwater discharges" and makes no exception for stormwater discharges that are channeled and those that are not, 33 U.S.C. § 1362(14). Since silvicultural stormwater runoff is analogous to, if not a form of, agricultural stormwater discharges, silvicultural stormwater runoff is also a nonpoint source discharge, regardless of whether it has been channeled. If the conclusion were otherwise, Congress would have created an anomaly by providing that channeled stormwater runoff is a point source discharge if it is from forest lands but not if it is from agricultural lands. Congress presumptively does not create anomalies unless it clearly so provides.

2. Assuming *arguendo* that the CWA is ambiguous concerning whether channeled silvicultural storm-

water runoff is a point source discharge or nonpoint source discharge, the EPA's Silvicultural Rule should be upheld under the *Chevron* doctrine, under which an agency interpretation of a statute is entitled to deference if the statute is ambiguous and the agency interpretation is permissible. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* doctrine applies because the Silvicultural Rule limits, rather than expands, federal authority to regulate subjects, such as water use and land use, that are traditionally regulated by state and local governments under principles of federalism. The Ninth Circuit failed to grant *Chevron* deference to the EPA's Silvicultural Rule, and interpreted the CWA *de novo*.

3. The Ninth Circuit decision adversely affects the interests of state and local governments. Under the decision, the states that administer their own NPDES programs—currently, 46 states administer such programs—would be required to regulate channeled stormwater discharges as part of their NPDES programs. Since there are a significant number of forest roads in the nation, state and local governments would bear a heavy regulatory and financial burden if NPDES permit requirements apply to individual stormwater discharges from these roads. Further, state and local governments that own or otherwise regulate forest lands may be potentially responsible as "operators" of point source facilities to obtain NPDES permits for stormwater discharges from such forest lands, which would increase the financial burdens on state and local governments. State and local governments are currently, and adequately, regulating stormwater discharges from forest lands under their nonpoint source programs. To require state and local governments to addi-

tionally regulate such discharges under their NPDES programs would greatly increase the regulatory burdens and costs to state and local governments without providing commensurate additional protection of water quality on forest lands.

ARGUMENT

I. UNDER THE CLEAN WATER ACT, SILVICULTURAL STORMWATER RUNOFF IS A NONPOINT SOURCE DISCHARGE REGARDLESS OF WHETHER IT IS CHANNELED OR FLOWS NATURALLY.

The Ninth Circuit held that silvicultural stormwater runoff is a *point source* discharge within the meaning of the CWA if it is "channeled and controlled" through a "discernible, confined, and discrete conveyance," such as a ditch, culvert, or channel, and is a *nonpoint source* discharge if it is not "channeled and controlled" but instead "is allowed to run off naturally." *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1070-71, 1079-80 (9th Cir. 2011) (hereinafter "*Brown*"). The court stated that a "conveyance" that channels stormwater runoff meets the definition of a "point source" under the CWA. The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel" or other type of like conveyance. 33 U.S.C. § 1362(14); *Brown*, 640 F.3d at 1079. The court concluded that the EPA's Silvicultural Rule is invalid to the extent that it "exempts" channeled silvicultural stormwater runoff from NPDES permit requirements. *Id.* at 1078-80.[2]

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[2] More precisely, the Ninth Circuit held that the "intent" of the Silvicultural Rule is to "exempt" silvicultural stormwater

The Ninth Circuit also held that the Water Quality Act of 1987, which extended the NPDES to stormwater discharges, specifically provides that the NPDES applies to "discharges associated with industrial activity," 33 U.S.C. § 1342(p)(3)(A), and that—since logging activity is a form of "industrial activity"—the 1987 Act also provides that channeled silvicultural stormwater runoff is a point source discharge within the meaning of the CWA. *Brown*, 640 F.3d at 1083-85.

In fact, the CWA contains several provisions and indicia, which the Ninth Circuit did not mention or apparently consider, supporting the conclusion that silvicultural stormwater runoff is *not* a point source discharge within the meaning of the CWA regardless of whether it is channeled or flows naturally.

First, the CWA has the dual goals of promoting improved water quality and preserving the states' traditional authority to regulate water quality and land and water development. The Ninth Circuit decision altogether ignores and fails to consider the

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runoff regardless of whether it has been "channeled," but that such a reading of the Rule is "inconsistent" with the CWA and thus "invalid." *Brown*, 640 F.3d at 1080. Contrary to the Ninth Circuit's view, the Silvicultural Rule does not "exempt" silvicultural stormwater runoff from NPDES permit requirements, but instead it *defines* the term "point source" as used in the silvicultural stormwater context. The Rule states, under "Definitions," that a "silvicultural point source *means*" certain types of silvicultural activities, such as rock crushing and gravel washing but that "[t]he term *does not include*" other types of activities "from which there is natural runoff." 40 C.F.R. § 122.27(b) (emphases added). Obviously an agency cannot grant an exemption from a congressional regulatory enactment unless Congress authorizes the agency to do so, but an agency can, and often does, define the terms of congressional enactments.

importance of the latter goal. Specifically, the CWA's declared goal and policy is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and also to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "to plan the development . . . of land and water resources," *id.* at § 1251(b). To the latter end, the CWA authorizes the states to administer their own NPDES programs subject to the EPA's approval, *id.* at § 1342(b). And, more importantly here, the CWA authorizes the states to regulate nonpoint sources of pollution, which are not regulated by the NPDES. *Id.* at §§ 1288, 1314(f); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002).[3]

The CWA thus effectuates a partnership between the federal government and state and local governments in controlling water pollution, and recognizes the significant role that state and local governments play in pursuing that goal and in regulating land and water use. Since Congress authorized state and local governments to regulate nonpoint sources of pollution, there is no basis for the Ninth Circuit's concern

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[3] The CWA also authorizes the states to adopt ambient water quality standards for bodies of water, separate from NPDES-established effluent limitations applicable to individual discharges into the waters. 33 U.S.C. § 1313. The CWA limits its intrusion into the states' traditional authority to regulate water use and land use by providing that the CWA does not impair or affect "any right or jurisdiction of the States with respect to the waters . . . of such States," *id.* at § 1370, and does not supersede, abrogate, or impair "the authority of each State to allocate quantities of water within its jurisdiction," or "supersede or abrogate rights to quantities of water which have been established by any State," *id.* at § 1251(g).

that silvicultural stormwater runoff will be unregulated and the CWA's goals impaired unless such runoff is held to be a point source discharge subject to regulation under the NPDES. On the contrary, the "primary responsibilities and rights" of state and local governments to control water pollution, 33 U.S.C. § 1251(b), and their authority to regulate nonpoint source discharges including silvicultural stormwater runoff, is fully consistent with Congress' goals. The Ninth Circuit's decision pays no heed to the congressional goal of preserving the states' traditional authority to control water pollution and regulate land and water use, which is a cornerstone of the CWA.

Second, the CWA expressly defines a "point source" as *not* including "agricultural stormwater discharges and return flows from agriculture." 33 U.S.C. § 1362(14). The CWA, in defining a point source as not including "agricultural stormwater discharges," does not distinguish between agricultural stormwater discharges that are "channeled and controlled" and those that are not. Therefore, *agricultural* stormwater discharges are nonpoint source discharges regardless of whether they are channeled or flow naturally. Since *silvicultural* stormwater discharges are analogous to—if indeed not a form of—agricultural stormwater discharges, silvicultural stormwater discharges are also nonpoint source discharges, regardless of whether they are channeled or flow naturally. There is no difference between channeled runoff from agricultural lands and from forest lands regarding the congressional goals and objectives of the CWA, and thus both forms of channeled runoff are nonpoint source discharges under the CWA. If the conclusion were otherwise, Congress would have created an anomaly by providing that channeled

stormwater discharges are point source discharges subject to NPDES regulation if they are from forest lands but not if they are from farm lands. Nothing in the CWA or its legislative history suggests that Congress intended to create such an anomaly. This Court has held that statutes should not be construed as creating anomalies unless Congress clearly so intended. *Small v. United States*, 544 U.S. 385, 390-91 (2005); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 145-46 (1967).

Third, the conclusion that silvicultural stormwater runoff, whether channeled or not, is a nonpoint source discharge is also supported by section 304(f) of the CWA. This provision requires the EPA to adopt "guidelines" for identifying "nonpoint sources of pollutants" and "processes, procedures, and methods to control pollution" resulting from, *inter alia*, "agricultural and silvicultural activities, including runoff from fields and crop and *forest lands*." 33 U.S.C. § 1314(f)(2)(A) (emphasis added). By identifying "nonpoint sources of pollutants" as including both "agricultural and silvicultural activities," including "runoff" from both agricultural lands and "forest lands," Congress made clear that agricultural runoff and silvicultural runoff are treated the same way, and that both are considered nonpoint sources of pollution.

Fourth, the EPA provided a reasonable explanation in its Silvicultural Rule for why silvicultural stormwater runoff cannot properly be considered a point source discharge simply because it has been channeled by ditches, pipes, or other conveyances. The EPA explained:

> [T]he Agency has carefully examined the relationship between the NPDES permit program

> (which is designed to control and eliminate discharges of pollutants from discrete point sources) and water pollution from silvicultural activities (which tends to result from precipitation events). It has been determined that most water pollution related to silvicultural activities is nonpoint in nature. This pollution is basically runoff induced by precipitation events and is not and should not be subject to the National Pollutant Discharge Elimination System (NPDES) permit program as it has been administered to date.
>
> Technically, a point source is defined as a "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch [or] channel . . ." and includes all such conveyances. However, a proper interpretation of the FWPCA . . . is that not every "ditch water bar or culvert" is "meant to be a point source under the Act [FWCPA]." It is evident, therefore, that ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff are not meant to be subject to the § 402 permit program.

41 Fed. Reg. 6,281, 6,282 (1976). Thus, the EPA explained that silvicultural stormwater runoff is primarily caused by rainfall rather than by industrial or municipal activity, unlike most other types of NPDES-regulated point source discharges, and therefore that the same NPDES controls that apply to industrial and municipal activity cannot properly be applied to silvicultural stormwater runoff. An industrial or municipal discharger generally has much greater control over the discharge of pollutants generated by the discharger's activity than counties that own logging roads or a logging company has over

the discharge of silvicultural runoff generated by rainfall.

Fifth, the EPA's Silvicultural Rule has been in place since its adoption in 1976, Congress has never overturned it, and state and local governments have reasonably relied on it since then. This Court has held that Congress may "acquiesce[e]" in administrative interpretations of statutes by failing to enact legislation to overturn the administrative interpretation, although it does so "with extreme care." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001). While Congress' failure to overturn the EPA's long-standing Silvicultural Rule is not entitled to great weight, it nonetheless has some probative value.

Sixth, contrary to the Ninth Circuit's view, the Water Quality Act of 1987 did not *sub silentio* overturn the EPA's Silvicultural Rule as applied to silvicultural stormwater runoff. Although the 1987 Act extended the NPDES to "stormwater discharges"—including "discharges associated with industrial activity," 33 U.S.C. § 1342(p)(3)(A)—the 1987 Act did not mention silvicultural stormwater runoff, and nothing in the Act reflects a congressional intent to overturn the Silvicultural Rule. Since the EPA adopted the Silvicultural Rule in 1976—11 years before the Water Quality Act was enacted in 1987—Congress would have affirmatively indicated its intent to overturn the Silvicultural Rule in enacting the 1987 Act, if it had intended to overturn the Rule.

Indeed, the Ninth Circuit's view that the Water Quality Act of 1987 provides that silvicultural stormwater runoff is a point source discharge—because such runoff is "associated with industrial activity"—would mean that *all* silvicultural stormwater runoff

is a point source discharge, regardless of whether the runoff has been channeled. The 1987 Act does not distinguish between different types of "discharges associated with industrial activity" depending on whether the discharges are channeled or flow naturally. Thus, if the 1987 Act applies to silvicultural stormwater runoff, as the Ninth Circuit held, it applies to all such runoff, whether channeled or not. This conclusion is inconsistent with the Ninth Circuit's acknowledgement that silvicultural stormwater runoff is a nonpoint source discharge if it has not been channeled. *Brown*, 640 F.3d at 1070. Thus, the Ninth Circuit's analysis of the 1987 Act is not only wrong but also internally inconsistent.

In sum, the CWA contains several provisions and indicia—which the Ninth Circuit did not mention—that support the conclusion that silvicultural stormwater runoff is *not* a point source discharge subject to NPDES regulation, regardless of whether it is channeled or flows naturally. Thus, the CWA should be so construed.

II. ASSUMING *ARGUENDO* THAT THE CLEAN WATER ACT IS AMBIGUOUS, THE EPA'S SILVICULTURAL RULE IS ENTITLED TO DEFERENCE UNDER THE *CHEVRON* DOCTRINE BECAUSE THE RULE LIMITS RATHER THAN EXPANDS FEDERAL AUTHORITY TO REGULATE SUBJECTS TRADITIONALLY REGULATED BY STATE AND LOCAL GOVERNMENTS.

We now assume *arguendo* that the CWA is ambiguous concerning whether channeled silvicultural stormwater runoff is a point source discharge or nonpoint source discharge. Under that assumption, this

Court should apply the *Chevron* doctrine in construing the CWA. Under *Chevron*, an agency's interpretation of a statute that it is responsible for administering is entitled to deference if the statute is "silent or ambiguous" and the agency's interpretation is "permissible." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *see Mayo Foundation v. United States*, 131 S.Ct. 704, 711 (2011); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995); *Arkansas v. Oklahoma*, 503 U.S. 91, 107 (1992). This Court should grant *Chevron* deference to the EPA's Silvicultural Rule, which interprets the CWA as providing that silvicultural stormwater runoff, even when channeled, is a nonpoint source discharge subject to regulation under state and local laws.

The *amici* do not argue that *Chevron* necessarily applies because the CWA is ambiguous or the EPA's interpretation is permissible. Rather, the *amici* argue that *Chevron* applies because the EPA's Silvicultural Rule limits, rather than expands, federal authority to regulate subjects, such as land use and water use, that are traditionally regulated by state and local governments under their own laws.

The Ninth Circuit wholly failed to apply the *Chevron* doctrine in analyzing the CWA, beyond briefly mentioning the doctrine in the "Standard of Review" portion of its decision, *Brown*, 640 F.3d at 1069, and in a fleeting passage later in the decision, *id.* at 1071. The court paid no deference whatever to the EPA's interpretation of the terms "point source" and "nonpoint source" in its Silvicultural Rule, and instead engaged in a wholly *de novo* interpretation of those terms. The Ninth Circuit decision was written almost exactly as it would have been written if this

Court had never decided *Chevron*, and if the *Chevron* doctrine did not exist.

Although the *Chevron* doctrine on its face appears to categorically require deference if certain objective factors are present—if the statute is ambiguous and the agency's interpretation permissible—this Court has not always applied *Chevron* based on these objective factors, and instead has often considered additional factors in deciding whether to grant deference. For example, this Court has construed federal statutes in order to avoid constitutional conflicts, thus limiting its deference to an agency construction that creates constitutional conflicts. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009).

This Court has considered an additional, and virtually dispositive, factor in deciding whether to grant *Chevron* deference—namely, whether the agency regulation *expands* the reach of a federal statute into areas traditionally regulated by state and local governments, and thus expansively construes the statute's preemptive effect, or instead whether the agency regulation *limits* the reach of the statute and thus limits its preemptive effect. This Court has readily granted *Chevron* deference to agency interpretations that *limit* federal intrusion into areas of traditional state and local regulation, but has cautiously, if at all, granted *Chevron* deference to agency interpretations that *expand* federal intrusion into such areas, at least where other compelling considerations favoring deference were not present. If an agency interprets a statute as authorizing federal intrusion into areas traditionally regulated by state and local governments, such as

water use and land use, countervailing principles of federalism come into play that limit deference to the agency's interpretation. Under these principles of federalism, Congress presumptively does not authorize federal intrusion into areas traditionally regulated by state and local governments unless it speaks clearly and unequivocally.

In applying the preemption doctrine, for example, this Court has held that Congress presumptively does not preempt state and local authority to regulate subjects within their traditional areas of jurisdiction "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("We ordinarily expect a 'clear and manifest' expression from Congress to authorize an unprecedented intrusion into traditional state authority."); *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). Similarly, this Court has held that the Constitution's Commerce Clause, U.S. Const. art. I, § 8, cl.3, limits Congress' power to enact laws that "effectually obliterate the distinction between what is national and what is local . . . ." *United States v. Lopez*, 514 U.S. 549, 557 (1995); *see United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000).

These principles of federalism inform the meaning and application of the *Chevron* doctrine. If a federal agency interprets an ambiguous statute as *limiting* federal regulation of areas traditionally regulated by state and local governments, the *Chevron* doctrine is more likely to converge with principles of federalism and properly be applied. If, however, the agency interprets an ambiguous statute as *expanding* federal

regulation of such areas, the *Chevron* doctrine is more likely to diverge from principles of federalism and properly not be applied.

Although this Court has not expressly distinguished for *Chevron* purposes between agency interpretations that expand federal intrusion into traditional areas of state and local regulation and agency interpretations that limit federal intrusion, this Court's decisions are nonetheless consistent with this distinction. Indeed, this distinction is supported by this Court's decisions construing the specific statute involved here, the CWA.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001), this Court *declined* to grant *Chevron* deference to a regulation adopted by the U.S. Army Corps of Engineers under the CWA, which authorized the Corps to regulate "isolated" waters, *i.e.*, waters not physically connected to navigable waters. The CWA authorizes the Corps to regulate "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. §§ 1344(a), 1362(7). Although the Court stated that the phrase "the waters of the United States" is not ambiguous and does not include "isolated" waters, the Court also stated that—even if the phrase were ambiguous—there would be no basis for applying *Chevron* in upholding the Corps' regulation. *SWANCC*, 531 U.S. at 172-73. The Court stated that the states have traditionally and historically regulated non-navigable waters, and thus the Corps' claimed authority to regulate "isolated" waters would result in a "significant impingement of the States' traditional and primary power over land and water use," *id.* at 161, 174, thus improperly allowing "federal encroachment upon a

traditional state power," *id.* at 173. The Court stated that Congress would not have invoked the "outer limits" of its constitutional power without a "clear expression" of its intent. *Id.* at 172. Invoking its "prudential desire not to needlessly reach constitutional issues," *id.*, the Court concluded that the CWA does not authorize the Corps to regulate "nonnavigable, isolated, intrastate waters," *id.* at 166. The Court overturned the Seventh Circuit decision below, which had relied on *Chevron* in upholding the Corps' regulation. *SWANCC*, 191 F.3d 845, 851, 853 (7th Cir. 1999), *rev'd* 531 U.S. 159, 174 (2001). Thus, the Court declined to grant *Chevron* deference to a federal regulation that expanded federal authority to regulate subjects traditionally regulated by state and local governments, and instead applied long-standing principles of federalism in construing the CWA.

Similarly, in *Rapanos v. United States*, 547 U.S. 715 (2006), this Court again *declined* to grant *Chevron* deference to a regulation adopted by the U.S. Army Corps of Engineers under the CWA, which interpreted the statutory phrase "the waters of the United States" as including virtually all wetlands in the nation. The Court's plurality opinion stated that the Corps' "expansive" interpretation of the phrase was foreclosed by its "natural definition," *Rapanos*, 547 U.S. at 731-32, but that "[e]ven if the phrase 'the waters of the United States' were ambiguous . . . our own canons of construction would establish that the Corps' interpretation of the statute is impermissible." *Id.* at 737.[4] Citing the Court's decision in *SWANCC*,

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[4] The plurality opinion interpreted the phrase "the waters of the United States" as including only "relatively permanent, standing or flowing bodies of water," *Rapanos*, 547 U.S. at 732,

the plurality opinion stated that "the Government's expansive interpretation would 'result in a significant impingement of the States' traditional and primary authority over land and water use,'" and that "[w]e would ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Id.* at 738 (citations and internal quotation marks omitted). As in *SWANCC*, the plurality opinion applied principles of federalism rather than the *Chevron* doctrine in construing the CWA.[5]

On the other hand, in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), this Court *applied Chevron* deference in upholding a federal regulation that—by limiting federal authority under the Endangered Species Act ("ESA")—effectively allowed a state to administer its

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and as including only wetlands that have a "continuous surface connection" to such waters," *id.* at 742. Justice Kennedy wrote a concurring opinion arguing that the phrase "the waters of the United States" also includes wetlands that have a "significant nexus" to navigable waters, but—like the plurality opinion—Justice Kennedy did not apply the *Chevron* doctrine in reaching this conclusion. *Id.* at 782 (Kennedy, J., concurring).

[5] On the other hand, this Court in *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995), in upholding the Secretary of the Interior's regulation defining "take" under the Endangered Species Act ("ESA"), applied *Chevron* as part of its statutory analysis, *id.* at 703, only after the Court had already determined that its interpretation was supported by the "text of the Act," *id.* at 697, by the "broad purpose" of the Act, *id.* at 698, and by the fact that Congress "understood" that the Act prohibited "indirect as well as deliberate takings," *id.* at 700. Although the Court's decision may have expanded the preemptive reach of the ESA, the decision was based largely on the Court's own analysis of the statute and not on the Court's deference to the Secretary's regulation under *Chevron*.

own NPDES programs under the CWA. There, the State of Arizona applied to the EPA for authority to administer its NPDES permit program. The CWA provides that the EPA "shall" approve such a state program if it meets the CWA's statutory criteria. 33 U.S.C. § 1342(b). The EPA determined that the Arizona program met the statutory criteria and approved the Arizona program. *Home Builders*, 551 U.S. at 654-55. But the Ninth Circuit held that the EPA violated the ESA by failing to "consult" with a designated service agency before approving the Arizona program. Under the ESA, a federal agency must "consult" before taking any action "authorized, funded or carried out" by the agency that may affect an endangered species. *Id.* at 649-50; 16 U.S.C. §§ 1536(a)(2), -(c)(1).

This Court, overturning the Ninth Circuit decision, applied *Chevron* in deferring to, and upholding and applying, a regulation adopted by the Secretaries of Interior and Commerce that did not require the EPA to consult with designated service agencies. The regulation required agency consultation in "all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added). This Court held that since the CWA provides that the EPA "shall" approve state NPDES programs that meet the statutory criteria, the EPA had no "discretionary" authority to disapprove the Arizona program, and therefore the EPA was not required to consult before approving the program. *Home Builders*, 551 U.S. at 665-68. Thus, the Court applied *Chevron* deference in upholding an agency regulation that, by limiting an agency's consultation obligation under the ESA, broadened a state's authority to administer its NPDES program under the CWA. The

Court's decision thus limited federal intrusion into areas traditionally regulated by the states.

In sum, in conformity with principles of federalism, this Court has applied *Chevron* deference where an agency construed a federal statute as *limiting* federal authority to regulate subjects of traditional state and local regulation, as in *Home Builders*, but has not applied *Chevron* deference where an agency construed a federal statute as *expanding* such authority, as in *SWANCC* and *Rapanos*.

Here, the EPA's Silvicultural Rule interprets silvicultural stormwater runoff, whether channeled or not, as a nonpoint source discharge subject to regulation under state and local laws, and thus limits federal regulation of a subject traditionally regulated by state and local governments. Thus, the *Chevron* doctrine converges with principles of federalism and properly applies. The Ninth Circuit accorded no *Chevron* deference whatever to the EPA's Silvicultural Rule. Thus, while the Silvicultural Rule is entitled to the greatest *Chevron* deference because it limits federal regulation of areas traditionally regulated by state and local governments, the Ninth Circuit accorded the Silvicultural Rule the least deference—indeed, no deference at all—and instead interpreted the statute *de novo* as authorizing federal regulation of traditional areas of state and local regulation. By *pro forma* acknowledging the *Chevron* doctrine but declining to apply it, the Ninth Circuit ignored the powerful jurisprudential principle embodied in the doctrine, namely that the courts should to the extent possible avoid construing ambiguous federal statutes as authorizing federal intrusion into areas traditionally regulated by state and local governments.

III. THE NINTH CIRCUIT DECISION WILL HAVE SIGNIFICANT, ADVERSE IMPACTS ON STATE AND LOCAL GOVERNMENTS.

A. The Ninth Circuit Decision Potentially Imposes Significant Costs And Liabilities On State And Local Governments.

If this Court upholds the Ninth Circuit's decision, this Court's decision would significantly burden state and local governments in their roles as NPDES permitting agencies and NPDES-regulated dischargers. To date, 46 states have been authorized to administer their own NPDES programs.[6] These NPDES-administering states issue permits to dischargers in lieu of the EPA's issuance of such permits. *Shell Oil Company v. Train*, 585 F.2d 408, 410, 412 (9th Cir. 1978); *District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980); *State of California v. U.S. Department of Navy*, 845 F.2d 222, 225-26 (9th Cir. 1988). An approved state program must have requirements at least as stringent as those of the federal program, and may have more stringent requirements if the state chooses. 33 U.S.C. § 1370; 55 Fed. Reg. 48,027 (Nov. 16, 1990).

Under the Ninth Circuit's decision, states that administer their own NPDES programs would be required to exercise NPDES permit authority over all stormwater discharges from logging roads that are channeled through ditches, culverts, and other conduits into rivers and streams because the Ninth Circuit's decision holds that such stormwater dis-

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[6] All states have EPA-approved NPDES programs except Idaho, Massachusetts, New Hampshire, and New Mexico. *State Program Status*, ENVIRONMENTAL PROTECTION AGENCY, http://cfpub.epa.gov/npdes/statestats.cfm (last visited Aug. 16, 2012).

charges are point source discharges subject to regulation under the NPDES. *Brown*, 640 F.3d at 1067. The states' exercise of NPDES permit authority over such stormwater discharges would impose a heavy regulatory and financial burden on the states. According to the U.S. Forest Service, there are approximately 386,000 miles of forest roads on forest lands owned by the federal government, and this figure does not even include logging roads on forest lands owned by state and local governments. 66 Fed. Reg. 3,245 (Jan. 19, 2001). As the EPA has stated, "the networks of forest roads on federal land are vast by any measure." 77 Fed. Reg. 30,475 (May 23, 2012). If the NPDES-administering states were required to exercise NPDES permit authority over every ditch, culvert, or other conduit on every logging road in the nation, and to monitor compliance with NPDES requirements, the states would bear a heavy regulatory burden, which would cost millions of dollars annually.

In addition, state and local governments may incur significant additional burdens and costs if they own or regulate the forest lands where logging operations take place. Although the federal government owns most of the public forest lands in the nation (76%), state and local governments also own a significant amount of such forest lands; the states own 21% and local governments own 3% of such lands. 77 Fed. Reg. 30,475 (May 23, 2012). In this case, for example, the State of Oregon, through its Department of Forestry and Board of Forestry, owns the lands in the Tillamook State Forest in Oregon, where the defendant timber companies conducted their logging operations. *Brown*, 640 F.3d at 1067. Under the EPA's regulations, the "operator" of a facility or activity subject to NPDES requirements is responsible for

acquiring an NPDES permit. 40 C.F.R. § 122.21(b). The EPA defines an "operator" of an industrial facility as the entity that has either "operational control over industrial activities, including the ability to modify those activities," or "day-to-day operational control of activities at a facility necessary to ensure compliance with the permit." ENVIRONMENTAL PROTECTION AGENCY, CONSTRUCTION GENERAL PERMIT App. A (2012), http://www.epa.gov/npdes/pubs/cgp2012_appendixa.pdf (definition of "operator"). Thus, if a state or local government has "operational control" over logging operations because it owns or regulates the forest lands and roads where the operations take place, or for the same reason has "day-to-day operational control" sufficient to "ensure compliance with the permit," the state or local government may be considered an "operator" of the logging operation and thus subject to NPDES permit requirements.

In short, state or local governments may be an "operator" subject to NPDES permit requirements simply because they own or regulate the forest lands where the logging operations take place. Under the Ninth Circuit's decision, any level of ownership, control, or regulatory authority over the forest roads may be sufficient to trigger NPDES permit requirements. A simple lease agreement under which a state or local government allows access to a forest road may be enough to establish liability. Thus, state or local governments may be subject to significant burdens and costs under the CWA to the extent they are considered "operators" and thus subject to NPDES permit requirements.

B. The NPDES Permitting Process Is Lengthy And Time Consuming, And State And Local Governments Would Incur Significant Additional Burdens And Costs If They Assume NPDES Authority Over Silvicultural Stormwater Discharges.

The CWA authorizes two types of NPDES permits: individual permits and general permits. Individual permits are issued for individual discharges and are specifically tailored to the individual facility or activity, and general permits are issued for categories of discharges that are substantially similar and result from substantially similar activity. 40 C.F.R. §§ 122.28, 123.25.

The process of issuing an NPDES permit, whether individual or general, is lengthy and time consuming. State and local governments would incur substantial burdens and costs if they were responsible for conducting this permit process or receiving permits in the context of silvicultural stormwater runoff. In issuing NPDES permits, the permit-issuing agency is required to take numerous, time consuming steps. These steps include drafting and submitting a permit application, 40 C.F.R. §§ 122.21(a), -(f), -(g), 122.26(c); developing technology-based and water quality-based effluent limitations, *id.* at §§ 122.44(a), -(d); developing monitoring requirements, *id.* at § 122.48; developing special conditions and considering variances and other applicable requirements, *id.* at §§ 122.21(m), 124.62; preparing a draft permit, *id.* at § 124.6; preparing supporting legal and factual analysis, *id.* at §§ 124.8, 124.56; issuing public notice and inviting public comments, *id.* at §§ 124.10, 124.57; responding to public comments, *id.* at §§ 124.11, 124.17; and

completing the review and issuance process, *id.* at § 124.15. This permit-issuing process routinely takes from three to five years, and requires countless hours of staff time by the permitting agency, as well as involvement by the permittee and the public. Moreover, the regulation of stormwater discharges affects a wide range of individual activities, is often highly controversial, and frequently leads to litigation.

An example of this lengthy and time consuming permit process is found in California's issuance of a general NPDES permit for stormwater discharges associated with construction activity. The California State Water Resources Control Board ("Board"), which administers the NPDES program in California, issued the first draft of the general permit for such discharges in March 2007. *California Building Industry Association v. State Water Resources Control Board*, Cal. Superior Court, Sacramento County, No. 34-2009-80000338 CU-WM-GDS, 6-7 (Dec. 2, 2011), http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/construction/judgment.pdf. The Board held a series of workshops during 2007 and 2008, in which it received public comments, and then issued a second draft in 2008. *Id.* The Board held a second series of workshops in 2008 and 2009, and issued a third draft in April 2009. *Id.* The Board conducted a formal hearing on the third draft on September 9, 2009, and adopted the permit on that date. *Id.* The permit was challenged by members of the construction industry, and the litigation was concluded at the trial level in December 2011, when a California Superior Court struck down portions of the permit. *Id.* at 28. Thus, it took more than four years—from early 2007 to late 2011—for the Board to issue the general permit and for the permit to be adjudicated in the courts.

Thus, the process for issuing a single *general* NPDES permit, as illustrated by the above example, is lengthy and time consuming, and imposes significant burdens and costs on the permitting agency and the permit applicant. If, as the Ninth Circuit decision holds, the permitting agency were required to issue *individual* NPDES permits for individual logging operations, and to establish effluent limitations for each logging operation, the cumulative burdens and costs to the agency and permit applicant would be significantly greater. At a time when state and local governments are already facing severe budgetary constraints, these additional burdens and costs should not be imposed upon state and local governments unless Congress clearly required NPDES permits, which it has not.

C. The Environmental Impacts Associated With Forest Roads Are Adequately And Appropriately Addressed Under The States' Nonpoint Source Programs.

The imposition of these additional burdens and costs is particularly inappropriate because state and local governments are adequately addressing the impacts associated with stormwater runoff from forest roads under their nonpoint source discharge programs. Congress has authorized the states to regulate nonpoint sources of pollution under sections 208 and 304(f) of the CWA. 33 U.S.C. §§ 1288, 1314(f).

An example of how the states are adequately addressing the impacts of stormwater runoff from forest roads is found in the instant case. Like most states, Oregon has adopted a comprehensive system for regulating water quality, which includes regula-

tion of nonpoint source discharges. *See, e.g,* ORE. REV. STATS. §§ 468B.015-468B.050. Under this regulatory system, the Oregon Department of Forestry ("ODF") has adopted best management practices ("BMPs") that logging companies must implement in conducting logging operations on forest lands in the state. For example, the ODF has mandated that discharges from forest roads must be directed away from surface waters. According to the ODF regulations:

> The forest floor can usually absorb large amounts of water, and can be used to greatly reduce the potential for muddy runoff entering streams. In western Oregon, undisturbed forest soils can often absorb over 10 inches of water per hour. When muddy runoff waters are directed to these soils, water flows into the ground, leaving the road-generated sediment on the forest floor . . . .
>
> Drainage waters must be directed onto undisturbed soils. Cross drains need to be installed as close to stream crossings as possible and allow between 15 and 200 feet of ground filtering between the outlet of the cross drain and the high water level of the stream, as measured from the stream.

OREGON DEPARTMENT OF FORESTRY, INSTALLATION AND MAINTENANCE OF CROSS DRAINAGE SYSTEMS ON FOREST ROADS 6 (2003).[7]

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[7] For additional BMP requirements applicable within the State of Oregon, *see also Road Maintenance*, THE FOREST PRACTICE NOTES (Oregon Department of Forestry, Salem, Oregon), July 1999, http://cms.oregon.gov/odf/privateforests/docs/roadmaintfpnote4.pdf; and OREGON DEPARTMENT OF FORESTRY, FOREST

Thus, Oregon appropriately addresses stormwater discharges from forest lands under its nonpoint source laws. Because of differences in climate, soil conditions, and geography among the states, BMPs for stormwater discharges are best developed at the state and local level rather than the national level. State and local governments that are most familiar with these local conditions can properly tailor BMPs to local conditions. In authorizing state and local governments to regulate silvicultural stormwater discharges under their nonpoint discharge programs, Congress fully recognized the importance of state and local governments in effectuating the broad goals of the CWA.

D. Requiring NPDES Permits For Forest Roads Would Limit Public Access To Public Lands.

The Ninth Circuit decision, by imposing significant additional burdens and costs on state and local governments, would discourage the construction of new forest roads and potentially result in the divesture or closing of existing roads. This would, in turn, potentially reduce public access to public forest lands.

Although the Ninth Circuit downplayed the point, forest roads are more than access paths for timber companies to conduct logging operations. *Brown*, 640 F.3d at 1084. Forest roads also provide public access to the nation's forest lands for recreational activities such as backpacking, camping, fishing, hiking, birding, hunting, and mountain biking. The roads likewise provide the basis for economic activity, such as

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ROADS MANUAL (July 2000), http://cms.oregon.gov/odf/pages/state_forests/roads_manual.aspx.

mining operations, fishing, and agriculture. The Ninth Circuit decision places these recreational and economic activities at risk by increasing the liability of state and local governments for logging operations on public forest lands, which may result in fewer roads and less public access to the nation's forest lands. This outcome is contrary to the CWA's declared "national goal" of providing for "the protection and propagation of fish, shellfish, and wildlife" and for "recreation in and on the water." 33 U.S.C. § 1251(a)(2).

E. Requiring NPDES Permits For Silvicultural Activities Would Potentially Have Adverse Economic Consequences Without Providing Any Significant Environmental Protection.

As described above, state and local governments are able to effectively regulate stormwater discharges from forest lands under their nonpoint source laws. Here, for example, the State of Oregon has adopted nonpoint source programs and other laws that reduce and limit pollutant discharges from forest roads. To require state and local governments to adopt an additional system of regulation, by requiring them to apply NPDES permit requirements to pollutant discharges from forest roads, would add another layer of bureaucracy in regulating stormwater discharges from the roads, without commensurately increasing the environmental protection of forests and their water quality. The Ninth Circuit decision also would increase the potential exposure of state and local governments to third party lawsuits claiming that stormwater discharges are not being adequately regulated under the NPDES program.

In addition, the Ninth Circuit decision would potentially increase the costs of, and substantially delay, the production and sale of timber products supplied by forest lands. A recent study conducted by the National Association of Forest Owners estimates that the costs to a timber company of obtaining an NPDES permit for a logging operation could be between $16,000 and $24,000 per logging operation. FREDERICK CUBBAGE & ROBERT ABT, POTENTIAL ADMINISTRATIVE AND ECONOMIC IMPACTS OF NPDES PERMIT REQUIREMENTS FOR FOREST ROADS IN THE SOUTH 2 (Dec. 7, 2011), http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-South1.pdf. According to the study, such a cost increase could lead to very large decreases in net revenues and the elimination of all profits for small and probably large landowners. *Id.* By increasing the costs of and substantially delaying the production of timber products, the Ninth Circuit would threaten the economic viability of other industries that are dependent on the timber industry, such as sawmills that process timber products, and would jeopardize the jobs of those employed by these other industries. This would, in turn, cause economic hardship to communities, particularly small communities near forests, that are dependent on the timber industry for providing jobs and a tax-base. Depending on the severity of the economic hardship, the effect might even erode the tax base of an entire state. Thus, the Ninth Circuit decision has consequences, perhaps unintended, that extend far beyond the simple regulation of stormwater discharges from forest lands.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the Ninth Circuit decision.

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IN THE

Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, *et al.*, *PETITIONERS*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*, *RESPONDENTS*.

GEORGIA-PACIFIC WEST, INC., *et al.*, *PETITIONERS*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*, *RESPONDENTS*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NORTHWEST ENVIRONMENTAL ADVOCATES ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Northwest Environmental Advocates (NWEA) has spent the last 26 years working with and litigating against the U.S. Environmental Protection Agency (EPA) and the states of Oregon and Washington to enforce and implement the Clean Water Act in the Pacific Northwest. While regulation of point source water pollution has seen relative success, nonpoint source pollution has gone largely unregulated and uncontrolled and, with respect to forestry operations in Northwest forests, has been glaringly under-regulated. The continually degraded and often deteriorating condition of rivers and streams affected by forest operations and logging roads has been the object of NWEA's efforts in a number of cases.[2]

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[1] No party or counsel for a party to this case has authored any part of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. All such monetary contributions have been made exclusively by these amici and their counsel. Pursuant to Rule 37.6 consent is granted.

[2] *Northwest Envtl. Advocates v. City of Portland*, 74 F.3d 945 (1996)(suit to enforce water quality standards); *Northwest Envtl. Advocates v. United States EPA*, 855 F.Supp2d 1199(2012)(challenge to EPA approval of Oregon water quality standards); *Northwest Envtl. Advocates v. United States EPA*, 2009 U.S. Dist. LEXIS 10456(2009)(same); *NWEA v. U.S. EPA*, No. 06-479-HA (2008)(consent decree on human health and aquatic life criteria for toxic water pollutants); *NWEA v. Browner*, No. 00-679-HO

Established in 1969, NWEA is a regional non-profit environmental organization incorporated under the laws of Oregon in 1981, with its principal place of business in Portland, Oregon. NWEA's mission is to work through advocacy and education to protect and restore water and air quality, wetlands, and wildlife habitat in the Pacific Northwest. NWEA has focused on ensuring that the water quality-based regulatory programs of Oregon and Washington meet the requirements of the Clean Water Act by its involvement in the states' development and revision of water quality standards, lists of impaired waters that fail to meet water quality standards, Total Maximum Daily Loads (TMDL),[3] which are

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(Cont.'d) (D. Or. 2000) (order approving consent decree to enforce TMDL provisions of Clean Water Act in Oregon); *Hawes v. State*, 203 Or. App 255 (2005)(Intervenors to compel Clean Water Act enforcement against nonpoint source challenge) .

[3] "Total Maximum Daily Loads" (TMDLs) are assessments of the amount of a particular pollutant that can be discharged into a particular stream segment without violating water quality standards. 33 U.S.C. § 1313(d)(1)(C). A TMDL must be done for each waterway on a state's list of waters that do not meet and are not expected to meet water quality standards after the application of technology-based controls. 33 U.S.C. §1313(d)(1)(A), (B).

scientifically-based clean-up plans for waters impaired by pollution, and NPDES discharge permits. NWEA has also been involved in bringing enforcement cases against point source dischargers of pollution, such as untreated sewage from the City of Portland. The organization has actively participated in numerous state, local and national advisory committees. It has sought to ensure that nonpoint sources of polluted runoff are controlled through state and local regulatory programs. NWEA has also advocated for inclusion of the Lower Columbia River into the EPA's National Estuary Program, run an educational boat program, and published educational materials.

The Native Fish Society (NFS) is an Oregon non-profit public interest organization with more than 500 members and an office in Oregon City, Oregon. NFS is dedicated to the conservation of native, wild fish in the Pacific Northwest and responsible stewardship of their habitat. NFS uses the best available science to advocate for historically abundant wild, native fish and promote the stewardship of the habitats that sustain them. NFS, its members, and its volunteers participate in agency administrative actions, public policy development, information gathering and dissemination, education and public outreach, and other activities relating protecting and

recovering wild fish, especially focusing on salmon and steelhead threatened with extinction and listed under the Endangered Species Act (ESA).

The NSF was one of the petitioners to seek the ESA listing of Oregon Coast coho salmon in 1998 and again in 2001, and defend that species against delisting. *Trout Unlimited v. Lohn*, 2007 WL 2973568 (D. Or., Oct. 5, 2007). Oregon Coast coho continue to be threatened with extinction in large part because of degraded habitat and water quality caused by land use activities under the Oregon Forest Practices Act. NFS members and volunteers represent the organization in the development of water quality clean-up plans and other forums to improve water quality and protect and recover Oregon Coast coho from continued and future harm caused by forest practices and other nonpoint sources of water pollution.

The Center for Biological Diversity (CBD) is a non-profit organization whose mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health. The CBD has more than 474,000 members and online activists nationwide, and has offices in a number of states, including Portland, Oregon. The CBD works through science, law and creative media to secure a future for

all species, great or small, hovering on the brink of extinction.

The CBD's primary goal is to protect and recover threatened and endangered species. In the Pacific Northwest and elsewhere, pollution from logging roads, including sediment, often results in adverse impacts to threatened and endangered fish, including salmon and steelhead. *See e.g.*,77 Fed. Reg. 30473, 30476 (May 23, 2012). CBD has worked for years to help protect and recover imperiled salmon and steelhead in the Pacific Northwest, including from the adverse impacts of logging roads in the coastal range of Oregon.

The Clean Water Network (CWN), founded in 1992, is the largest grassroots coalition in the country devoted solely to protecting the nation's water resources. The CWN consists of more than 1,200 public interest organizations across the U.S., representing more than 5 million people, working to strengthen clean water and wetlands policies and implement the Clean Water Act. The CWN was established to be a central clearinghouse for news and information and an advocacy arm for the clean water community. The organization helps facilitate communications among member groups and coordinate joint policy and position statements.

The CWN focuses its combination of federal policy work and coordination to achieving a stronger national effort to bring polluted waterways back to health and to preserve our nation's rivers, lakes, streams, wetlands, estuaries and coastal waters. Its members include organizations comprising environmentalists, hunters and anglers, surfers and boaters, farmers and garden clubs, faith and labor organizations, smart growth planners, consumer advocates, and civic organizations interested in protecting waterways and drinking water supplies.

SUMMARY OF ARGUMENT

1. While the regulation of point source pollution has seen considerable success in cleaning up the rivers, streams and lakes of the United States, nonpoint source pollution controls lag far behind. According to the General Accountability Office, as of 2012, "[n]onpoint source pollution remains the leading cause of impairment of the nation's waters."

2. Eighty percent of our freshwater sources originate in our forests. The so-called "best management practices" on which state and federal regulators rely to control sedimentary runoff from forest roads are not sufficient to protect drinking water, recreation and fish habitat.

3. Oregon, in which the present case arose, exemplifies a chronological catalogue of failed attempts to control pollution from forestry operations. Its "best management practices" are defined by state law as meeting water quality standards, although in fact they do not and never have.

ARGUMENT:

Nonpoint Source Forestry Controls are not Working.

The assertions of Petitioners and their *Amici* that nonpoint source forestry regulation is "an environmental success story"[4] cannot bear comparison with the historical record. The facts are that the state regulatory and non-regulatory[5] "best management practices" approach on which EPA and the states

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[4] Brief of *Amici Curiae* Society of American Foresters *et al.* at 12.

[5] The Brief of *Amici* States of Arkansas, *et al.* ("State's Brief") claims that forestry is conducted in the United States under the "most comprehensive program of BMPs of any land use activity in the nation." States' Brief at 16. Of course such a claim is impossible to define, let alone prove. In fact, according to that same brief, only six of the 50 states have mandatory BMPs, while ten others have "non-regulatory BMP programs." *Id.* and nn. 2, 3.

have relied to address water pollution from forest operations has largely failed to keep sediment from logging roads out of forest streams, resulting in the clogging of municipal drinking water systems, the suffocation of salmon spawning beds, and rising stream temperatures.

I. Congress's Approach to Nonpoint Sources

Congress established in the 1972 amendments to the Clean Water Act (CWA) a national interim goal to meet water quality standards by 1983, focused on controlling pollution discharges from permitted point sources. 33 U.S.C. §§ 1251(a)(2), 1311, 1342. The CWA required each state to develop water quality standards for its waters to be met by controlling pollution from point sources, which the CWA defines as "discernible, confined and discrete conveyance[s]"[6] and pollution from nonpoint sources which are all other sources.[7]

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[6] 33 U.S.C. §1362(14).

[7] OAR 340-041-0002(43). Congress also explicitly recognized that expeditiously cleaning up nonpoint source pollution is essential to enable the statutory goals for point sources to be met. 33 U.S.C. § 1251(a)(7).

The CWA as constructed in 1972 did not, however, invest EPA with authority to regulate nonpoint source pollution. In 1987, Congress amended the Act to address "the growing national awareness of the increasingly dominant influence of nonpoint source pollution on water quality[.]"[8] The 1987 CWA amendments added the following goal:

> It is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

33 U.S.C. 1251(a)(7). To meet this goal, the 1987 amendments added section 319 to the CWA to require states to assess nonpoint source pollution problems and causes, and to adopt and implement nonpoint source management programs 33 U.S.C. § 1329(a) and (b).

Just three years later, Congress made another attempt to address states' lack of nonpoint source

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[8] EPA, *NOAA Guidance Specifying Management Measures For Sources Of Nonpoint Pollution In Coastal Waters*, EPA 840 B 92 002 January, 1993, at 1-2 available at http://www.gpo.gov/fdsys/pkg/CZIC kf3790 u56 1993/html/CZIC kf3790 u56 1993.htm.

controls. The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) recognized that "[n]onpoint source pollution is increasingly recognized as a significant factor in coastal water degradation." CZARA Sec. 6202(a)(5).[9] CZARA required EPA and the National Oceanic and Atmospheric Administration (NOAA) to co-administer the coastal nonpoint pollution program. 16 U.S.C. § 1455b.

CZARA did not give EPA and NOAA direct authority to establish nonpoint source controls but, rather, it required them to approve or disapprove state coastal nonpoint source control programs 16 U.S.C. § 1455b(c). States with approved programs may continue to obtain federal grant funding but where states have not gained approval by specific dates set out in the statute EPA and NOAA are required to cut federal grants by specific percentages, 16 U.S.C. § 1455b(c)(3) and (4).

Despite the unambiguous requirement for mandatory cuts in federal grants to coastal states not controlling nonpoint source pollution, EPA and NOAA

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[9] Land uses in the coastal zone, and the uses of adjacent lands which drain into the coastal zone, may significantly affect the quality of coastal waters and habitats, and efforts to control coastal water pollution from land use activities must be improved. 16 U.S.C.§ 1451(k).

have ignored the statutory deadlines for such cuts.[10] Despite repeated findings that states' nonpoint source programs are inadequate and thus not approvable, EPA and NOAA have never disapproved any state's coastal nonpoint source pollution control plan. *Id.*

II. "Nonpoint source pollution remains the leading cause of impairment of the nation's waters."

Point source regulation under the NPDES permit system has made significant strides in reducing pollutant discharges to ensure that point sources are not causing or contributing to violations of water quality standards. In contrast, as a direct result of EPA's reliance on states' control of nonpoint source pollution, the country's efforts to clean up widespread water pollution from nonpoint sources have largely failed. As of 1993, some sixty percent of state water quality standards violations in the country were caused by nonpoint source pollution.[11]

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[10] See National Oceanic and Atmospheric Adminstration, *Ocean and Coastal Resource Management, Coastal Nonpoint Program Approval Findings*: http://costalmanagement.noaa.gov/nonpoint/pro_approve.html.

[11] Robert L. Glicksman, *Pollution on the Federal Lands II: Water Pollution Law*, 12 J.Envtl. L. & Policy 61, 71-73

Fifteen years later, according to EPA, nonpoint sources remained the dominant source of surface water pollution nationally.[12] According to the Government Accountability Office,

> Forty years after the 1972 Clean Water Act recognized the problem of water pollution from diffuse, or nonpoint, sources—such as runoff from farms or construction *sites—nonpoint source pollution remains the leading cause of impairment of the nation's waters.* The Environmental Protection Agency (EPA) reports that more than 33,000 water bodies nationwide are impaired

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(Cont.'d)
(1993)(nonpoint sources responsible for "about sixty percent of state water quality standard violations"); *See also* William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?* 55 Ala. L. Rev. 537, 544 n.36 (2004), 42.

[12] EPA, *National Probable Sources Contributing to Impairments*, http://ofmpub.epa.gov/waters10/attains_nation_cy.control#prob_source, last accessed October 13, 2012 (59 percent of assessed river and stream miles violate water quality standards due to nonpoint sources); Douglas Endicott, Great Lakes Environmental Center, *National Level Assessment of Water Quality Impairments Related to Forest Roads and Their Prevention by Best Management Practices* at 3 (2008) (Study commissioned by EPA)("Endicott Study").

> primarily by such pollution; that is, they do not meet water quality standards to provide for, among other things, propagation and protection of aquatic wildlife and human use and recreation.

United States Government Accountability Office (GAO) *Report to Congressional Requesters, "Nonpoint Source Water Pollution: Greater Oversight and Additional Data Needed for Key EPA Water Program"* ("GAO 2012 Report"), May, 2012 at 1 (emphasis added). Reviewing EPA's nonpoint source program for the past 22 years, the GAO concluded

> In 1990, when we last reported on EPA's section 319 [nonpoint source grant] program, we found that inherent conflicts existed between some federal agencies' policies and states' water quality goals. Pollution trends since that time suggest that such inherent conflicts and their downstream consequences remain today.

Id. at 2. After nearly a quarter century, the condition of the nation's waters suggests to the GAO that states have been unable to control nonpoint source pollution and, as a consequence, pollution from nonpoint sources "remains the leading cause of impairment to the nation's waters." *Id.* Nonpoint source controls are not working.

In Oregon, forestry has been one of the top three non-NPDES permitted sources of water quality impairment, affecting some 7,580 miles of waterways in 1992.[13] Sedimentation and turbidity accounted for 1,260 miles of those impairments. *Id.*, Figure 3.2-1a.

III. Forests as Polluted Water Sources

The water most Americans drink comes from the woods. Four out of five of our rivers begin in forested lands:

> Forests cover about one-third of the continental United States. Most major rivers and streams originate in forested catchments, and 80 percent of the nation's freshwater sources originate in these forests. In 2000, the US Forest Service (USFS) calculated the marginal value of water from all National Forest System (NFS) lands to be at least $ 3.7 billion per year. Between 50 and 75 percent of the population of the United States relies on forest lands for good quality water, and approximately 60 million people rely on NFS lands as the primary

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[13] Oregon Department of Environmental Quality, *Oregon's 1992 Water Quality Status Assessment Report, 305(b) Report*, April 1992, Fig 3.2-1(b), page 3-9.

> source of their drinking water.

EPA, *Notice of Intent to Revise Stormwater Regulations, etc.*, 77 Fed. Reg. 30473, 30476 (May 23, 2012). Sediment pollution from logging on the nation's public and private forests has a significant negative impact on fresh water for drinking, recreation, and fish habitat:

> Stormwater discharges from logging roads, especially improperly constructed or maintained roads, may introduce significant amounts of sediment and other pollutants into surface waters and, consequently, cause a variety of water quality impacts.

Id. The logging industry is among the top twelve probable sources of impaired water quality in the nation, known to be muddying fresh water in 19,444 miles of rivers and streams. *Id.* Still, almost three quarters of rivers and streams, over half of lakes, reservoirs and ponds, and most coastal waters have not yet been assessed. *Id.*

Sediment discharges in stormwater from logging roads harm "dozens of sensitive aquatic biota" such as salmon, trout, amphibians, and the entire food chain on which their survival and the biological complexity of the waters depend." *Id.* Such sediment discharges also threaten municipal drinking water systems. *See infra* at 29-32.

EPA has commissioned research to study the nationwide effects of forestry operations on sediment in streams. Endicott Study, *supra.* That research found that "forestry-related sediment is a leading source of water quality impairment to rivers and streams nationwide." *Id.* at 2. EPA guidance for coastal nonpoint source pollution control programs emphasizes that "up to 90% of the total sediment production from forestry operations" comes from logging roads and stream crossings.[14]

Evaluating for EPA the effectiveness of state "best management practices" ("BMPs") in addressing forest road impacts on water quality, the Endicott Study concluded that such BMPs are "largely procedural, describing the steps to be taken in determining how a site will be managed," but they lack "practical in-stream criteria for regulation of sedimentation from forestry activities." Endicott Study at 70. This EPA-commissioned study also found that BMPs are often defined and implemented based on what is practicable in view of "technological, economic, and institutional consideration" *Id.* at 72. In other words, state BMPs are often established on

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[14] EPA, *Guidance Specifying Management Measures For Sources of Nonpoint Pollution in Coastal Waters*, EPA Guidance Paper 840-B-93-001c, at 27 (1993).

grounds other than what is required to meet state water quality standards.[15]

That is certainly true with respect to forest operations in Oregon, where the instant case arose. Nonpoint source regulation is, in Oregon forests, an exercise in nominal compliance by legislative presumption: BMPs are presumed by statute to meet water quality standards.[16] That presumption is contrary to fact.

IV. Nonpoint source pollution control of forestry operations is not improving: An Oregon Chronology

The historical record of Oregon's efforts to control water pollutants from logging shows deterioration, not progress.

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[15] While the *substantive* inadequacies of forestry BMPs to achieve water quality standards are many and varied, some such flaws apply generally. For example, Washington is the *only state* that requires modern BMPs to be applied to old forest roads. Endicott Study at 118-19. In other states, such roads are "grandfathered" and continue discharging sediment to forest rivers and streams without use of modern management practices. *Id.*

[16] ORS 527.770 and text *infra* at 39-44.

A. 1998 – Oregon Forest Practices Fail to Meet Water Quality Standards and CZARA Requirements

Notwithstanding CZARA's statutory requirement to approve or disapprove coastal states' nonpoint source pollution control programs,[17] EPA and NOAA have failed to act on Oregon's deficient program – and the programs of every one of the other 34 states and territories covered by CZARA – by the deadlines set out in the statute.[18] In 1998, however, the federal agencies did discuss why they were not approving Oregon's coastal nonpoint program, identifying conditions the state needed to meet to gain "full" approval. [19] In their findings, EPA and NOAA stated:

> Although Oregon has the basic legal and programmatic tools to implement a forestry program in conformity

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[17] Discussed *supra* at 8-11.

[18] National Oceanic and Atmospheric Adminstration, *Ocean and Coastal Resource Management, Coastal Nonpoint Program Approval Findings* http://coastalmangement.noaa.gov/nonpoint/pro_approve.html.

[19] EPA, NOAA, *A Pollution Prevention and Control Program for Oregon's Coastal Waters: Supplemental Information in Response to the Federal Findings of January 1998*, (April 1999).

with[CZARA], these tools are inadequate to ensure that water quality standards are attained and maintained and beneficial uses protected. This conclusion is based on best available information, including the most recent [CWA] 303(d) listings for Oregon waters, which indicate water quality impairments from forestry. Related to these water quality impairments, Oregon has a number of aquatic species, in particular anadromous salmonids, that are endangered, threatened, or otherwise seriously at risk, due in part to forestry activities that impair coastal water quality and beneficial uses, including salmon spawning, rearing, and migration habitat. * * *

Thus, Oregon will need to adopt additional management measures for forestry in areas adjacent to coastal waters not attaining or maintaining applicable water quality standards or protecting beneficial uses, or that are threatened by reasonably foreseeable increases in pollutant loadings from new or expanding forestry operations[.]

Id.

As a consequence of their findings, EPA and NOAA required Oregon to identify and begin applying additional management measures for forestry, as needed to meet water quality standards, within two years to specifically address "protection of medium, small, and non-fish bearing streams, including intermittent streams; protection of areas at high risk for landslides; the ability of forest practices to address cumulative impacts of forestry activities; road density and maintenance, particularly on so-called "legacy" roads; and the adequacy of stream buffers for application of certain chemicals." *Id.*

B. 1999 – Oregon Science Team Concurs with EPA and NOAA that Oregon Forest Practices are Inadequate to Meet Water Quality Standards.

The Independent Multidisciplinary Science Team (IMST) is a scientific review panel charged with advising the State of Oregon on matters of science related to the Oregon Plan for Salmon and Watersheds established in 1997.[20] In 1999, the IMST issued a report that echoed the 1998 CZARA findings

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[20] ORS 541.914.

of EPA and NOAA. The IMST found that Oregon's forestry operations BMPs were inadequate to, *inter alia*, protect small non-fish-bearing streams which are essential to recovery of wild salmonids, protect floodplains to prevent erosion, and recruit sufficient woody debris to streams.[21]

The IMST's findings on small non-fish-bearing streams in particular demonstrate the fallacy that state forestry regulations in Oregon are adequate to meet water quality standards. A common rule of thumb is that a full 75 percent of a watershed is composed of non-fish-bearing streams.[22] The IMST recommended that Oregon rules that provide for no or limited riparian buffers on such non-fish bearing streams, riparian buffers should be required because

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[21] Independent Multidisciplinary Science Team, *Recovery of Wild Salmonids in Western Oregon Forests: Oregon Forest Practices Act Rules and the Measures in the Oregon Plan for Salmon and Watersheds*, Technical Report 1999-1, ("IMST Forestry Report") September 8, 1999 at 31-32 available at http://www.fsl.orst.edu/imst/reports/1999-1.pdf(last accessed October 16, 2012).

[22] Pacific Northwest Research Station, U.S. Forest Service, *Saving Streams at Their Source: Managing for Amphibian Diversity in Headwater Forests*, 99 Science Findings 1 (January 2008) available at http://www.fs.fed.us/pnw/sciencef/scifi99.pdf (last accessed October 3, 2012).

of the importance of small streams to watershed functions. IMST Forestry Report at 43-44. Since the IMST report Oregon has made no changes to riparian buffers on non-fish-bearing streams.

In particular, the IMST Report evaluated research on the contribution of fine sediment from logging roads, concluding that "there is significant scientific evidence to show that management actions can influence chronic sediment production from roads. This evidence is well documented and is known to [the Oregon Department of Forestry]."[23] The science panel went on to state that fully one third of road systems on state and private land in western Oregon "can deliver sediment to streams *by ditch delivery*" and that "reducing the amount of road drainage water that flows into channels can reduce sediment delivery to streams." *Id.* (emphasis added).

The IMST specifically focused on the impact of forestry operations on sedimentation of rivers and streams because "[f]orestry operations increase the amount of chronic and episodic production of fine sediments. Disproportionally high amounts of fine sediment, compared with the coarser elements of stream structure (large wood, boulders, gravel, and cobble) diminish the quality of habitat for wild

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[23] *Id.* at 80.

salmonids." *Id.* at 39. The science panel pointed to ways in which excess fine sediment can be reduced by "designing, locating, constructing, and maintaining [logging] roads to minimize failure and to prevent road drainage from entering streams[.]" *Id.* The IMST concluded that Oregon's BMPs were inadequate to control sedimentation from logging roads including, specifically, "road drainage directly into channels." *Id.* at 32. Consequently, the IMST made a number of recommendations to change logging road regulations. *Id.* at 46-47. The minimal rule changes made subsequently did not respond to the IMST's recommendations.

C. 2001 – Nonpoint source regulation under the Oregon Forest Practices Act "is not sufficient to accomplish the recovery of wild salmonids."

Conditions in Oregon waters affected by forestry have continued to degrade. In 2000, the Oregon Department of Environmental Quality and Department of Forestry submitted for federal review a "Sufficiency Analysis: Stream Temperature" (known as the SAST). The Sufficiency Analysis focused on temperature because Oregon has numeric

temperature criteria in its water quality standards,[24] in contrast to its difficult-to-interpret sediment narrative criterion,[25] and the parameter is also relatively easy and inexpensive to monitor. As a result, Oregon's CWA section 303(d) program for identifying impaired waters and developing TMDL clean-up plans to address the pollutant impairments has likewise been focused on temperature.[26]

Stream temperature is directly related to excess sedimentation and therefore acts as a measure of many nonpoint source impacts. As Oregon's IMST explained, changes in channel morphology, the flow of groundwater and subsurface water, and the removal of riparian vegetation – all of which are results of forestry operations – can be measured as increases in stream temperatures.[27] In particular, sedimentation

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[24] OAR 340-041-0028(4).

[25] OAR 340-041-0007(12).

[26] *See, e.g.*, DEQ, *Oregon TMDLs Approved by EPA - May 2000 through October 112* (sic, 2010), http://www.deq.state.or.us/WQ/TMDLs/approved.htm (last accessed October 14, 2012).

[27] IMST, *Oregon's Water Temperature Standard and its Application: Causes, Consequences, and Controversies Associated with Stream Temperature, A Report of the Independent Multidisciplinary Science Team, Oregon Plan for Salmon and Watersheds, Technical Report* 2004-1, May 7, 2004,

of streams increases temperature. *Id.* at 67-68.

Three federal agencies reviewed Oregon's draft Sufficiency Analysis – the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). Their cover letter to the state agencies summarized their conclusions, based on "overwhelming" evidence, that Oregon forest practices were not satisfying the Clean Water Act (CWA) or the Endangered Species Act (ESA)[28] :

> We realize that it is not possible to determine the exact magnitude of forest practice effects to stream temperature for specific stream reaches in a statewide sufficiency analysis. The evidence is, however, overwhelming that forest practices on private lands in Oregon contribute to widespread stream

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(Cont.'d)
Figure 4 at 67 available at http://www.fsl.orst.edu/imst/reports/2004-01.pdf (last accessed October 16, 2012).

[28] EPA, NOAA, NMFS, *Review of the December 2001 [sic, 2000] Draft Sufficiency Analysis: Stream Temperature (Oregon Departments of Forestry and Environmental Quality) by the Environmental Protection Agency, National Marine Fisheries Service, and U.S. Fish and Wildlife Service* (February 2001), cover letter February 28, 2001 at 2.

> temperature problems and degraded salmonid habitat conditions. These effects of forest practices do not meet the goals of the CWA or ESA.

The federal agencies also concluded that Oregon's own 2000 "Sufficiency Analysis" validates the findings of the 1999 Oregon IMST that the practices established by the Oregon Forest Practices Act are "not sufficient to accomplish the recovery of wild salmonids."[29] *Id.*

The federal agencies also criticized Oregon's almost exclusive focus on temperature impacts of shade cast by trees and the state's concurrent failure to consider the role of sedimentation in evaluating the sufficiency of the state's forestry practices.[30] Specifically, the agencies cited studies showing forestry operations cause accumulations of fine sediment that clog salmon spawning gravels.[31] Citing the numerous ways in which logging roads increase sedimentation of streams, especially fine sediments, the federal agencies concluded "[t]he FPA rules do not

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[29] "Attachment 1" at 9.

[30] *Id.* at 6.

[31] *Id.* at 7-8

provide adequate measures to address the above sediment-related factors [of road effects]"[32].

D. 2003 – Forestry management "does not yet meet conditions."

Two years later, on January 10, 2003, EPA and NOAA compiled comments on Oregon's Coastal Nonpoint Pollution Control Program pursuant to CZARA for Oregon's Department of Environmental Quality staff. Again the federal agencies found "[t]he significant management measure in this group of program components that does not yet meet conditions is the additional management measure for forestry."[33] The federal agencies also recognized the particular significance of this deficiency to Oregon coastal water quality because

> forestry is the predominant land use in the coastal watersheds and since the [Forest Practices Act] and [forestry

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[32] *Id.* at 8-9.

[33] EPA/NOAA, *6217 Boundary Decision; and Response to* Oregon's *Supplemental Information in response to the Federal Findings of January 1998*, submitted April 1999, January 2002, and October 2002 (A "2003 Boundary Decision"), cover letter January 10, 2003 at 1.

> regulations] are most often put forward as the implementation plan for Total Maximum Daily Loads (TMDLs) [to meet water quality standards] on private and state forest lands.

Id. Plainly, as of 2003, nonpoint source controls were still not working to control pollution from forest operations treated as nonpoint sources.

E. 2008 – EPA and NOAA Reconfirm that Oregon's Forest Practices Fail to Meet Water Quality Standards

In 2008, noting the continuing failure by Oregon to meet CZARA requirements for forestry, EPA and NOAA stated yet again that "[a] broad body of science continues to demonstrate that the [Forest Practices Act] rules do not adequately protect water quality."[34] The federal agencies went on to conclude that:

> Based on Oregon's recent submittal and our understanding of Oregon's Forestry Program, EPA and NOAA still believe that Oregon lacks adequate management

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[34] EPA, NOAA, *NOAA and EPA Preliminary Decisions on Information Submitted by Oregon to Meet Coastal Nonpoint Program Conditions of Approval*, June 12, 2008 at 10.

> measures under the Oregon Forest Practices Act (FPA) rules for protecting water quality and the degradation of beneficial uses from forestry activities. EPA and NOAA's primary concerns, stated in the 1998 conditional findings and reiterated in the 2004 interim decision document, remain. Oregon still lacks adequate measures for protecting riparian areas of medium, small and non-fish bearing streams, high risk landslide areas, and for addressing the impacts of legacy roads.

Id.[35]

F. 2010 – Nonpoint source forest pollution causes Oregon Coast municipal water systems to suffer "long term concerns about system viability or increased treatment costs."

In June, 2010, the Oregon Department of Environmental Quality(DEQ) issued an assessment of the effects on drinking water of turbidity in Oregon

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[35] In 2009, NWEA challenged the federal agencies' continuing failure to take a final approval or disapproval action on Oregon's coastal nonpoint pollution control program. *NWEA v. Locke.* Civil No. 09-0017 (D. OR.)

coastal watersheds.[36] Turbidity – suspended solids, causing cloudiness, in water – "may interfere with public water system operations, can increase operational costs and can also cause shutdowns."[37] Evaluating eight public water systems, DEQ concluded:

> there are long-term concerns about system viability or increased treatment costs at five systems (Arch Cape Water District and the cities of Astoria, Carlton, Siletz, and Yamhill), based on large numbers of high-turbidity days and/or increasing numbers of high-turbidity days recorded in daily water samples for these systems. Also, DEQ found that turbidity is increasing in the long term in Drinking Water Source Areas for five systems, remains stable at one system, and is decreasing at two others.

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[36] DEQ, "*Turbidity Analysis for Oregon Public Water Systems: Water Quality in Coast Range Drinking Water Source Areas*" ("Turbidity Analysis"), June 2010 available at: http://www.deq.state.or.us/wq/dwp/docs/TurbidityAnalysisOregonPWS201006.pdf (last accessed October 17, 2012).

[37] *Id.* at 1.

Id. As has been previously noted, Oregon's coastal watersheds are mostly forest land. Not only is forestry the predominant use in these watersheds but forested lands are the primary source of drinking water for area communities.[38]

For more than half of the coastal municipal water systems evaluated in the 2010 DEQ study, the agency still has long-term concerns about whether the systems can remain viable or whether the costs of treating turbid water are likely to increase. That trend is not improvement, consistent with the goals of the CWA but, rather, declining water quality. Oregon nonpoint source controls for forestry operations are not working to keep this drinking water clear.

Moreover, the 2010 Turbidity Analysis appears to demonstrate a state unwillingness to act upon the existing data that demonstrate forest practices' effects on water quality. Referring to the state's 2002 "Sufficiency Analysis," the 2010 DEQ study claims that there are not enough data upon which to improve forest practice:

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[38] 2003 Boundary Decision, *supra*, cover letter at 1 ("forestry is the predominant land use in the coastal watersheds"); Turbidity Analysis at 1 ("Drinking Water Source Areas for these Coast Range systems are predominantly forested.").

> The [Sufficiency Analysis] identifies that the effects of practices along small non-fish-bearing streams on downstream sediment regimes is an issue that needs research and that data are lacking on turbidity and fine sediment effects of forest practices. The data and scientific literature in this report may be able to meet some of these identified data gaps and research needs.

Id. at 37. In contrast, however, DEQ's claim of data deficits being on "turbidity and fine sediment effects of forest practices," the state's own independent science panel – the IMST– and three federal agencies had already concluded that the generation of fine sediment by logging operations, including roads, was causing demonstrable water quality problems.

Nonpoint source regulation is not protecting drinking water from the effects of forest practices in Oregon coastal watersheds.

G. 2011 – Biological Review Team Confirms Forestry Threatens Fish Survival in Oregon Coastal Watersheds

On February 11, 2008 the National Marine Fisheries Service (NMFS) issued its final

determination listing the Oregon Coast coho salmon as a threatened species under the Endangered Species Act.[39] In its 2011 status update for the species, NMFS noted that "[t]imber harvest and associated roads have extensively altered aquatic ecosystems . . . which in turn has consequences for fish populations and their habitat[.]"[40] Stating that water quality has long been identified as a factor for decline of Oregon Coast coho salmon, NMFS noted that 40 percent of species' distribution miles are known to be impaired for temperature, *id.* at 68, and that the effects of forestry operations were most pronounced on private and state lands. *Id.* at 55.

The Biological Review Team was particularly concerned with the effects of logging roads on water quality in the watersheds inhabited by the species, finding that the "condition of aquatic habitat and fish populations is also directly correlated with the density of roads in a watershed,"*id.* at 53, and noting that there were high levels of sediment in streams of

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[39] 73 Fed. Reg. 7816 (Feb. 11, 2008).

[40] Northwest Fisheries Science Center, NMFS, *Draft Revised Report of the Biological Review Team,Scientific Conclusions of the Status Review for Oregon Coast Coho Salmon (Oncorhynchuskisutch)* May 16, 2011 at 53, available at http://www.nwr.noaa.gov/Publications/Biological-Status-Reviews/upload/OCC-review-2011.pdf (last accessed October 16, 2012).

the Oregon Coast range. *Id. at 59.* It also cited the impacts of logging roads on water quality, finding no improvement over the ten-year period of consideration, 1998 to 2008. *Id.* at 60. The science team finally concluded that "effects of logging activities and associated road building on stream conditions, the wide-spread occurrence of these activities, and lack of any sign that logging activities are abating, [must be taken] as indications that these threats to habitat are pervasive and ongoing in the [Oregon Coast] coho Salmon[.]" *Id.*

H. More Oregon waters fail to meet water quality standards for sedimentation and temperature now than 10 years ago.

Under section 303(d) of the CWA, states must list all of the waters under their jurisdiction that do not meet water quality standards or are not expected to meet those standards with the application of pollutant limitations prescribed in the Act. 33 U.S.C. § 1313(d). Waters are listed on this "303(d)" list with respect to particular impairments, thus a stream segment must be "listed for sedimentation" if that segment does not meet the state's water quality standard for sediment. Comparing a state's 303(d) lists over time provides a fair indication whether a state is making progress with respect to controlling a

particular pollutant. If regulatory and non-regulatory nonpoint source controls were succeeding in Oregon, one would expect to see fewer waters listed as impaired by logging over time.

That is not what Oregon's 303(d) lists of impaired waters show; indeed the trend is very much in the opposite direction. The Oregon 303(d) list for 2002 included 65 segments listed for sedimentation.[41] The 2004/2006 list had 106,[42] and the most recent list, for 2010, showed 143 segments,[43] more than double

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[41] DEQ, *Water Quality: Water Quality Assessment, Search DEQ's 2002 303(d) List Database ("2002 database")*, http://www.deq.state.or.us/wq/assessment/rpt02/searchlist.asp (query set at "all waterbodies" and "sedimentation").

[42] DEQ, *Water Quality Assessment - Oregon's 2004/2006 Integrated Report Database, Review the 2004/2006 Integrated Report Database ("2004/6 database")*, http://www.deq.state.or.us/wq/assessment/rpt0406/search.asp (query set at "all watersheds," "sedimentation," and Water Quality Limited TMDL needed - 303(d)" and "Water Quality Limited TMDL not needed - TMDL approved").

[43] DEQ, *2010 Database, Water Quality Assessment - Oregon's 2010 Integrated Report Assessment Database and 303(d) List*, Review the 2010 Integrated Report Database ("2010 Database"), http://www.deq.state.or.us/wq/assessment/rpt2010/search.asp (query set at "All subbasins," "All waterbodies," "sedimentation" and "Water Quality Limited - All (Categories 4 and 5)."; Letter from Michael A. Bussell, EPA to Greg Aldrich, Oregon DEQ,

the number listed as impaired in 2002.

Oregon's listings for biocriteria violations, which are an indicator of excess sedimentation,[44] demonstrate a similar increasing trend with 24 segments listed in 2002,[45] 37 segments in 2004/6,[46]

(Cont.'d)
Partial Approval/Partial Disapproval of Oregon's Final 2010 303(d) List, Enclosure 3: Proposed Additions to Oregon's 2010 303(d) List (March 15, 2012) available at, http://www.epa.gov/region10/pdf/water/303d/oregon/Final_Enclosure_3_EPA_Proposed_Additions_OR2010.pdf.

[44] DEQ, *Methodology for Oregon's 2010 Water Quality Report And List of Water Quality Limited Waters (Pursuant to Clean Water Act Sections 303(d) and 305(b) and OAR 340-041-0046), May 12, 2011,* available at http://www.deq.state.or.us/wq/assessment/docs/2010AssessmentMethodology.pdf (biomonitoring reflects excess sedimentation).

[45] DEQ, *2002 Database* (query set at "all waterbodies" and "biocriteria"). (See *supra* footnote 44)

[46] DEQ, *2004/6 Database* (query set at "all watersheds," "biocriteria," and Water Quality Limited TMDL needed - 303(d)" and "Water Quality Limited TMDL not needed TMDL approved"). (See *supra* footnote 45)

and 361 segments proposed for the 2010 list,[47] a 15-fold increase in less than a decade. Temperature listings mirror this trend with 1,087 listings in 2002,[48] 1,314 listings in 2004/6,[49] and 1,444 listings in 2010.[50]

Oregon's failure to control nonpoint source pollution, including forestry operations and sediment from logging roads, is an example of a nationwide problem. Nationally, sedimentation is the second most frequent cause of impairment in the nation's

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[47] DEQ, *2010 Database*, (query set at "All subbasins," "All waterbodies," "biocriteria" and "Water Quality Limited - All (Categories 4 and 5)."; Letter from Michael A. Bussell, EPA to Greg Aldrich (See *supra* Footnote 46)

[48] DEQ, *2002 Database*, (query set at "all waterbodies" and "temperature"). (See *supra* footnotes 44 & 48)

[49] DEQ, *2004/6 Database*, (query set at "all watersheds," "temperature," and Water Quality Limited TMDL needed - 303(d)" and "Water Quality Limited TMDL not needed - TMDL approved"). (See *supra* footnotes 45 & 49)

[50] DEQ, *2010 Database*, (query set at "All subbasins," "All waterbodies," "temperature" and "Water Quality Limited - All (Categories 4 and 5)." (See *supra* footnotes 46 & 50)

assessed streams and rivers.[51] Washington, which shares a similar landscape to Oregon's has experienced the same increase in impaired waters over time. While Washington does not monitor for or identify sediment as a pollutant,[52] temperature is a measure of excess sedimentation as discussed *supra* at 24-25. In Washington, 303(d) listings of waters for temperature impairment jumped from 428 in 1996,[53]

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[51] EPA, *National Causes of Impairment, Watershed Assessment, Tracking & Environmental Results*, http://ofmpub.epa.gov/waters10/attains_nation_cy.control#causes.

[52] Washington Department of Ecology, *Assessment of Water Quality for the Clean Water Act Section 303(d) and 305(b) Integrated Report*, WQP Policy1-11, July 2012, available at http://www.ecy.wa.gov/programs/wq/303d/WQpolicy1-11ch1.pdf

[53] Washington Department of Ecology, *Water Quality Assessment for Washington, Simple Query Tool, 2008 Water Quality Assessment*, http://apps.ecy.wa. gov/wats08/, (query set at "temperature," "current 2008 category: ALL," and 1996 303(d) List: Y[es].

to 431 in 1998,[54] 930 in 2004,[55] and 1,343 in 2008,[56] a three-fold increase over 16 years.

V. Oregon's water quality standards are not the benchmarks for forest water quality in Oregon.

Oregon's Forest Practices Act (OFPA) only nominally requires logging practices to attain Oregon's EPA-approved water quality standards. First, while the OFPA provides that logging practices must "not impair the achievement and maintenance of water quality standards" it also explicitly requires

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[54] Washington Department of Ecology, *Water Quality Assessment for Washington, Simple Query Tool, 2008 Water Quality Assessment*, http://apps.ecy.wa.gov/wats08/, (query set at "temperature," "current 2008 category: ALL," and 1998 303(d) List: Y[es].

[55] Washington Department of Ecology, *Water Quality Assessment for Washington, Simple Query Tool, 2008 Water Quality Assessment*, http://apps.ecy.wa.gov/wats08/, (query set at "temperature," "current 2008 category: ALL," and 2004 Category 4a, 4b, and 5.

[56] Washington Department of Ecology, *Water Quality Assessment for Washington, Simple Query Tool, 2008 Water Quality Assessment* http://apps.ecy.wa.gov/wats08/, (query set at "temperature," "current 2008 category: 4a, 4b, and 5."

those practices to be limited by "technical, economic and institutional feasibility."[57] Second, the Oregon law provides that *existing forestry practices are deemed to meet water quality standards as a matter of law.*[58] Although salmon need clear water and gravels in which to spawn, rear and migrate, and municipal drinking water systems are limited in how much solid matter they can filter – the OFPA does not require that the water in forest streams affected by forestry operations *actually meet* the state's water quality standards. Instead, the OFPA *defines* any logging operation that uses the agency's "best management practices" as meeting water quality standards: "Forest operators conducting operations in accordance with the FPA *are considered to be in compliance* with Oregon's water quality standards."[59]

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[57] ORS 527.765(1)(d).

[58] ORS 527.770.

[59] "Turbidity" refers to particulate matter suspended in the water column. "Sediment" refers to particles that settle in the streambed. In fact, though Oregon has a numerical criterion for "turbidity", OAR 340-041-0036, and basin-specific criteria for "total dissolved solids", OAR 340-041-0032, it has no numerical criterion for the amount of sediment that may be added to a stream by a given activity. Whether soil runoff creates turbidity or sedimentation depends, among other conditions on the

The Oregon turbidity[60] standard provides that there shall be no more than a ten percent cumulative increase in stream turbidity as a result of any activity.[61] However, it makes no difference under the Oregon logging statute whether a forestry operation is causing the turbidity in a stream to *actually* increase by more than ten percent in the stream because the logging practices are not *actually* required to meet water quality standards. Water quality standards required under the CWA to protect drinking water and salmon spawning streams are conclusively presumed to be met if the practices defined as "best management practices" (BMPs) are in place. This is not a matter of interpretation; it is explicit in the statute:

> A forest operator conducting, or in good faith proposing to conduct, operations in

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(Cont.'d)
solubility of those soils.

[60] Memorandum from Directors of Oregon Department of Forestry and Oregon Department of Environmental Quality, October 17, 2002, *covering* "Sufficiency Analysis: A statewide Evaluation of Forest Practices Act Effectiveness in Protecting Water Quality"(emphasis added).

[61] OAR 340-041-0036.

> accordance with the best management practices currently in effect shall not be considered in violation of any water quality standard.

ORS 527.770.

Likewise, the repeated conclusions of numerous scientists at numerous agencies that Oregon's forest practices lead to violations of temperature and sediment criteria and pose a threat to designated uses, including threatened and endangered species, are rendered irrelevant by the Oregon forest practices statute.

It is no wonder that water quality impairments caused by forestry operations continue, on the 40th anniversary of the 1972 CWA amendments, to cause water quality standards to be violated. Those water quality standards, approved by EPA[62] and required by the Act to be the means by which water uses are protected, are not the actual measures with which forest operators in Oregon must comply. Instead, it is the BMPs – which have been demonstrated year after year to be deficient,– that provide the actual requirements for forestry operations, far divorced

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[62] The CWA requires states to enact, and EPA to approve, water quality standards sufficient to protect uses of the state's waters. 33 U.S.C. §1313(c).

from the state's actual water quality standards. As the Oregon District Court put it, discussing the state's water quality standards for temperature earlier this year in *NWEA v. EPA, supra,*

> For instance, OAR 340-041-0028(12)(e) provides that forest operations on State and private lands are to comply with water quality standards for temperature by implementing best management practices ("BMPs") already required under the Forest Practices Act (ORS 527.610-992) and that forest operations that comply with the BMPs are "deemed in compliance with" temperature standards. *This,and other provisions, essentially exempt various nonpoint sources of heat pollution from complying with water quality standards so long as they maintain the status quo.* * * * Given that many temperature impaired waters in Oregon are impaired in whole or in part by nonpoint sources of pollution, the challenged provisions could present a *considerable obstacle* to the attainment of water quality standards *when, by law, the sources of*

> *pollution are deemed to be in compliance with water quality standards.*

855 F. Supp2d at 1209-10 (emphasis added). In fact, the laws that apply to Oregon forestry operations as a "nonpoint source" present just such an obstacle to achieving clean and clear water quality:

> While the challenged provisions may not meet the EPA's definition of "water quality standards" those provisions clearly have the potential to interfere with the attainment of water quality standards by effectively supplanting those standards as they apply to nonpoint sources, possibly for years at a time.

Id. at 23.

As shown above, this is not only a theoretical legal problem. On the ground, and in the water, the basic and historical uses of Oregon waters – from municipal drinking water to salmon spawning and rearing – are not protected from nonpoint source pollution from forest operations. Nonpoint source "pollution control" does not work for Oregon forestry.

VI. Conclusion

According to the GAO, EPA, NOAA and NMFS, nonpoint source forest water pollution control has not worked nationally, including in Oregon. According to Oregon's section 303(d) reports of polluted stream segments, and the state's own independent science team, nonpoint source controls have not worked for Oregon forestry. The NPDES program that has been successfully applied to point source regulation can and should be applied to forest road discharges from pipes, ditches or other discrete conveyances, which are point sources. The Court should affirm the decision of the Ninth Circuit Court of Appeals.

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RECORD
AND
BRIEFS

Nos. 11-338, 11-347

In The
Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

GEORGIA-PACIFIC WEST, INC., et al.,

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NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

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On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, HUMBOLDT FISHERMEN'S MARKETING ASSOCIATION, AND SANTA CRUZ COMMERCIAL FISHERMEN'S ASSOCIATION IN SUPPORT OF THE RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Pacific Coast Federation of Fishermen's Associations (PCFFA) is a U.S. west coast-based commercial fishing industry trade association representing the interests and fishing heritage of approximately 1,200 commercial fishing families, many of whom depend on healthy salmon runs for all or a portion of their livelihoods. *Amici* Humboldt Fishermen's Marketing Association and Santa Cruz Commercial Fishermen's Association are also west coast commercial fishing industry trade associations whose members are economically dependent on ocean commercial salmon harvests for all or part of their livelihoods. *Amicus* Institute for Fisheries Resources is the marine resource protection and conservation affiliate of PCFFA, working to restore valuable west coast salmon fisheries and the aquatic habitats they rely upon. *Amici*'s economic interests are directly affected when excessive sediments from industrial logging roads are allowed to pollute salmon-bearing rivers, destroying key salmon habitat and jeopardizing downriver fishing industry jobs and communities.

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[1] Pursuant to S.Ct.R. 37.3(a) and 37.6, the undersigned represent that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

One of the principal purposes of the Clean Water Act, 33 U.S.C. §§ 1251-1367 ("CWA") is to ensure that those industries that derive economic benefits from activities that degrade the nation's waters must bear the costs associated with those activities, and cannot, in effect, simply shift those costs to downstream industries and other economic interests dependent on clean water and healthy, functioning ecosystems. The ruling below effectuates that purpose by providing that those who benefit from industrial logging road construction and the use of culverts, ditches, and similar methods for draining polluted stormwater into streams, rivers, lakes and other water ways must mitigate those impacts through compliance with the National Pollutant Discharge Elimination System ("NPDES").

In the absence of such compliance, Respondents and other logging companies will, in contravention of the CWA scheme crafted by Congress, continue to shift the costs of their polluting activities to salmon fisheries and other downstream industries that are in no way responsible for the pollution and derive no benefit from it, but which must nonetheless bear the economic brunt of the ecological harms associated with such pollution.

Salmon populations throughout the Pacific Northwest and, in turn, the fishermen who depend on those populations for their livelihoods, are gravely affected by environmental contaminants that disrupt and

impair the complex life cycles of myriad salmonid species. The severe sedimentation and related turbidity associated with channeled culvert discharges from industrial logging roads are major contributors to such impacts in water ways throughout the Pacific Northwest. Accordingly, the ruling below, which merely requires industrial timber companies that deliberately channel stormwater into water ways through culverts, ditches and similar conveyances to comply with the NPDES program, enforces vital protections for valuable salmon fisheries and other downstream economic interests that otherwise must continue to pay a steep price for polluting practices over which they have no control.

ARGUMENT

I. EFFECTIVE REGULATION OF DISCHARGES FROM LOGGING ROADS UNDER THE CWA IS NECESSARY TO ENSURE THAT THE ECONOMIC IMPACTS OF POLLUTION CAUSED BY LOGGING ROADS ARE BORNE BY THOSE RESPONSIBLE FOR THE POLLUTION RATHER THAN OTHER BUSINESSES THAT DEPEND ON UNPOLLUTED WATER BODIES.

The overarching goal of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251. In enacting the comprehensive protections mandated by the Act, and particularly the NPDES program at the

heart of the Act, Congress recognized that the degradation of the nation's water ways not only threatened the public's health and recreational uses of rivers, streams, lakes, and other water bodies, but also that other national economic interests – particularly those of fishermen and other downstream businesses not responsible for the pollution – would also be greatly benefitted from enhanced regulation. *See, e.g.*, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. (Comm. Print 1973) ("Leg. Hist.") at 162 (statement of lead Senate Sponsor Muskie) (explaining that urgent action was necessary in view of the "grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated waste, and oceans which no longer provide us with food").

Accordingly, Congress established a "national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish [and] shellfish" be "achieved by July 1, 1983." 33 U.S.C. § 1251(2); *see also* Leg. Hist. at 189 (statement of Sen. Cooper) (recognizing that protecting fish and shellfish resources "will require a high level of water quality" as well as the "need for a permit system to apply these standards precisely to the sources of discharge of pollutants"); *id.* at 215-16 (statement of Sen. Bayh) (highlighting the protection and restoration of fish and other aquatic resources as a central purpose of the Act); *id.* at 386 (statement of Rep. King) ("There is increasing awareness that the abatement of [water] pollution will . . . enhance

supplies of known and potential food products."); *id.* at 409 ("[I]f [businesses] don't have the quality and quantity of water supply they need to operate and produce their product, they are not going to be in business in any case.").

Indeed, "externality prevention" – *i.e.*, the notion that those responsible for the economic impacts caused by pollution should bear the burden of preventing or addressing it, rather than shifting that burden to other businesses – "is one of the purposes of many of our modern environmental laws," including the CWA. Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 Md. L. Rev. 290, 359 (2009). This rationale for regulation stems from the "logic of cost-externalization," which "drives human enterprises to pass on potential and actual social costs into the commons of society and the environment." Zygmunt J.B. Plater, *Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice and Societal Governance in Which Everything is Connected to Everything Else*, 23 Harv. Envtl. L. Rev. 359, 365 (1999) ("Humans tend to make decisions on relatively short-term horizons, and in insulated self-referential terms. . . . When we are involved in a production activity, we resolutely display an inclination to pass wide the costs, while holding close the benefits and profits. Thus there is a universal tendency of individuals and associations toward cost externalization."); *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

Accordingly, a central function of the CWA is to ensure that businesses and local governments will "internalize the cost of pollutant disposal, as opposed to allowing them to discharge pollutants and externalize the cost" to other interests that suffer the effects of pollution they had no responsibility for creating. Jonathan Rosenbloom, *New Day at the Pool: State Preemption, Common Pool Resources, and Non-Place Based Municipal Collaboration*, 36 Harv. Envtl. L. Rev. 445, 463 (2012); *see also* Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 Harv. Envtl. L. Rev. 49, 53-54 (2008) ("Most environmental laws address harms that cross property boundaries and impact the property of another. . . . Environmental harms that affect persons and property other than the source of the harm are basic examples of an economic externality."). The NPDES program is the principal mechanism under the CWA for internalizing costs associated with water pollution and degradation that adversely affects downstream economic interests. *Id.* at 73.

The use of culverts, ditches, and similar conveyances to channel sediment-laden stormwater off logging roads and into streams and other water bodies – with attendant adverse impacts on the economic interests of *amici* fishermen and other businesses that depend on clean water and healthy ecosystems – is the classic kind of externality the CWA was designed to address. As the Environmental Protection Agency ("EPA") has recently recognized, "[s]tormwater

discharges from logging roads, especially improperly constructed or maintained roads, may introduce significant amounts of sediment and other pollutants into surface waters and, consequently, cause a variety of water quality impacts." 77 Fed. Reg. 30473, 30476 (May 23, 2012). Logging roads are a leading source of impairment of rivers, streams, and coastal shorelines, *id.*, and as summarized by EPA, stormwater discharges from such roads

> *can adversely affect the survival of dozens of sensitive aquatic biota (salmon, trout, other native fishes, amphibians and macroinvertebrates) where the species are located. Increased fine sediment deposition in streams and altered streamflows and channel morphology can result in increased adult and juvenile salmonid mortality where present. . . . Potential effects . . . can include increased loading of sediment due to erosion and mass wasting, increased suspended solids and turbidity, increased sediment deposition and bed load, alteration of stream morphology and channel simplification, altered streamflow, pollution from other chemicals associated with forest roads, increased turbidity and sedimentation in water treatment and supply systems, siltation of streambed substrates, impairment of spawning and rearing habitat, and degradation of habitat for salmonids, other fish, invertebrates, and other aquatic organisms.*

Id. (emphasis added).

Impacts of inadequately regulated logging road discharges are felt directly by the *amici* fishermen and other economic interests that play no role in the construction, maintenance, or use of the roads that impair the water ways on which these interests depend. Although Petitioners complain about the costs of complying with the NPDES program, Pet. Br. (No. 11-437) at 46-50, the costs associated with the pollution at issue *should* be borne by those responsible for it rather than those downstream businesses harmed by it.

In any event, the Court should be aware that there are significant economic interests that agree with Respondents on the need for appropriate regulation of logging road culvert sediment stream discharges under the NPDES program. Especially because this case is still at the pleading stage, Respondents' allegations that the use of culverts, ditches and similar conveyances in connection with logging roads contributes directly to declines of populations of salmonids and other species, *see* J.A. Vol. II at 17, have not been fleshed out with the development of a factual record. Accordingly, the information presented in this and other *amicus* briefs supporting Respondents is highly relevant to whether logging roads are associated with the kind of serious degradation of the nation's waters – and injuries to other interests that rely on those waters – that Congress sought to address through the CWA and the NPDES program.

II. SALMON-DEPENDENT ECONOMIES DEPEND ON UNPOLLUTED SALMON RIVER SYSTEMS.

Salmon are an important national food resource and the biological basis of a major west coast fishing industry supporting many thousands of jobs. Salmon, however, cannot live in highly polluted waters, and thus their very existence – and the industries that depend upon them – are in turn dependent upon strong enforcement of the CWA.

Salmonids[2] are an "anadromous" fish species. This means their eggs are laid far inland in cold, freshwater mountain streams after full-grown spawning adult salmonids return from the ocean, which they entered two to five years earlier as juveniles. Those eggs then hatch a few weeks later – *but can only survive if the water is clear and cold enough to support them.* Once they hatch, the emerging juveniles first inhabit their gravel beds until they can grow large enough to gradually migrate downriver to the

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[2] There are many different species of fish often commonly (and confusingly) referred to as "salmon." Fisheries biologists more precisely call this group of fish "salmonids," which usually refers to any or all of the following fish species in the scientific genus *Oncorhynchus*: chinook or king salmon (*Oncorhynchust shawtscha*); coho or silver salmon (*Oncorhynchus kisutch*); coastal searun cutthroat (*Oncorhynchus clarki clarki*); steelhead (*Oncorhynchus mykiss gairdneri*); chum salmon (*Oncorhynchus keta*); pink salmon (*Oncorhynchus gorbuscha*); and sockeye salmon (*Oncorhynchus nerka*). All have very similar anadromous lifecycles.

saltwater estuary as "smolts." There they biologically adapt to the hostile salt water environment, then migrate out to sea to grow to adulthood – and then return to fresh water to start their amazing lifecycle all over again.

Once these fish enter the ocean, they migrate sometimes thousands of miles north and south along the coastline, eating and growing as they go until reaching maturity and returning to their natal streams to spawn. How they find their way back to the same stream sites where they originally hatched is still a mystery, but is apparently an ability that chemical and sediment pollutants in their natal rivers can easily disrupt.

Some degree of sediment inflows to salmon-bearing river systems is natural, contributing nutrients as well as spawning gravel to river ecosystems. But too much sediment is a very bad thing for young salmonids. *See Amicus* Br. (Nos. 11-338, 11-347) Western Div. American Fisheries Society, *et al.*

As EPA has recently reaffirmed, excess sediment loads destroy a river system's ecological carrying capacity and harm salmonids in a variety of ways. *See* 77 Fed. Reg. 30473, 30476 (May 23, 2012). In particular, fine sediments smother salmonid eggs, and clog the gills of young fish, killing them quickly by suffocation. Excess river sediment also reduces visibility so that young fish have a much harder time seeing and avoiding predators. Increased turbidity from these sediments also slows down in-stream

photosynthesis, impoverishing the entire river food chain when young fish most need to feed.[3]

This in turn means far fewer salmon for humans to harvest in later years, when each year's juveniles return as harvestable adults – and that means economic losses and many lost fishing-related coastal jobs.

III. ENVIRONMENT-RELATED DECLINES IN THE ECONOMIC VALUE OF U.S. COMMERCIAL SALMON FISHERIES.

Even though there have been major losses in the productivity of many once-abundant salmon-producing rivers, the U.S. commercial salmon harvest still contributes greatly to the economies of the Pacific Northwest and Alaska, in 2011 landing an estimated 780.1 million pounds of salmon valued at more than $618.3 million in *ex vessel* (*i.e.*, price paid at the dock) value.[4] Once the fish enter the stream of commerce at the processors, they can create several times that

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[3] *See also* Spence, Brian C., *et al.*, *An ecosystem approach to salmonid conservation*, Report No. TR-4501-96-6057, ManTech Environmental Research Services Corp., Corvallis, OR (Dec. 1996), at 86 & 110. Available at: www.nwr.noaa.gov/Publications/Reference-Documents/ManTech-Report.cfm.

[4] National Marine Fisheries Service ("NMFS"), *Fisheries of the United States 2011* (Aug. 2012), Table at 13. Available at: www.st.nmfs.noaa.gov/st1/fus/fus11/FUS_2011.pdf.

value in "personal income impacts" throughout the stream of commerce.[5]

However, the vast bulk (about 95%) of this 2011 salmon harvest was contributed by the Alaska fishery, largely due to widespread and long-term salmonid population declines in the once primary salmonid-producing regions of northern California, Oregon and Washington. In those "lower-48" Pacific Northwest states, numerous and synergistically acting adverse environmental impacts, mostly human-caused, have disrupted and damaged many ecologically sensitive salmon-producing rivers, already pushing many of that region's once abundant salmonid runs into biological extinction. Many other runs now require protections under the Federal Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA") to prevent extinction. As coastal salmonid numbers declined, so did commercial and recreational harvests – and coastal fishing-based economies.

Finally, in 1991 a landmark scientific salmonid population assessment was published by the American Fisheries Society (AFS), the nation's oldest and most prestigious scientific society of fisheries scientists and fish managers. *That study estimated that more than 100 wild salmonid runs that once occurred*

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[5] Net economic or "personal income impacts" are generally a multiplier of 2.0 to 4.5 times their initial *ex vessel* (*i.e.*, at the processor, on the docks) wholesale value, depending on the model used.

throughout the Pacific Northwest had already been pushed to extinction, and that about 214 of the remaining wild runs still hanging on were either in danger of extinction or "species of concern" because of their still ongoing declines. In nearly all cases, poor instream habitat due to decreasing water quality was identified as a major factor in those declines.[6]

In earlier studies of the economic value of Pacific Northwest salmonid fisheries, commercial salmon harvests in northern California, as of 1988, generated an estimated $94.723 million in personal income impacts (in 1988 dollars) and supported some 4,000 median wage jobs. Commercial salmonid harvests in Oregon during that same year (1988) also generated an estimated $89.062 million in personal income impacts, supporting an additional 4,450 median wage jobs.[7] Since 1988, however, there have been repeated ocean salmon fishery failures resulting from increasingly widespread fisheries closures necessitated by the accelerating loss of salmon habitat productivity in most of northern California and the Pacific Northwest.

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[6] Nehlsen, W., J.E. Williams, and J.A. Lichatowich, *Pacific salmon at the crossroads: stocks at risk from California, Oregon, Idaho, and Washington*, FISHERIES 16(2):4-21(1991). Available at: www.tandfonline.com/toc/ufsh20/16/1.

[7] Pacific Rivers Council, *Economic imperative of protecting riverine habitat in the Pacific Northwest*, Research Report No. 5 (Jan. 1992). Available at: www.pcffa.org/PRCReport1992.pdf.

By way of economic comparisons between the two year's reports, between 1988 and 2011, landings of salmon in California in 1988 were recorded at 17.269 million pounds – but at only 1.1 million pounds in 2011, representing a loss of 94% in California landings. In Oregon, the 1988 season harvest landed 17.708 million pounds of salmon – but only 2.4 million pounds were landed in 2011, a loss of 86% in landings. If expressed purely in terms of proportional lost median wage jobs from the 1988 baseline, this would be a job loss of 3,760 jobs in California and of 3,827 jobs in Oregon. These kinds of massive job losses have been *devastating* for the isolated rural coastal communities in which these kinds of fishing industry jobs losses tend to be concentrated.[8]

These 1988-to-2011 salmon landings comparisons demonstrate major salmon fishery economic losses over the last 24 years in both northern California and Oregon ocean commercial salmon fisheries.[9] This

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[8] Single-year harvest numbers are, of course, only "snapshots" of a dynamic system changing annually. This cursory analysis, however, does demonstrate the long-term salmon productivity trend for northern California and Pacific Northwest salmon-producing rivers over the last several decades, *i.e.*, consistently downward to the point where many of these once abundant salmonid runs are now ESA-listed.

[9] Only in Washington State has the salmon harvest been relatively comparable between those two years of 1988 and 2011. Salmon landings in Washington State in 1988 came in at 35.955 million pounds but at 38.3 million pounds in 2011 – a slight increase. This likely reflects the fact that today so many landings of salmon caught in the Southeast Alaska fishery are coming

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in turn reflects the fact that so many California and Oregon salmon populations have been in steep decline over the last several decades due to multiple adverse environmental impacts on their in-stream habitat. While ocean conditions also play a major role in salmon survival rates, ocean conditions during that time frame have been variable but on average normal (and roughly comparable as between 1988 and 2011), while the instream habitat and water quality of most major salmon streams continued to decline nearly everywhere in the Pacific Northwest, as demonstrated by numerous ESA listings for salmonids that followed after 1988.

Since the 1991 AFS paper was published, numerous Pacific Northwest wild salmonid populations have been determined by the National Marine Fisheries Service ("NMFS"), the federal agency with jurisdiction over ESA protections for anadromous species, as being at risk of extinction. Today 28 genetically separate populations of these species have been placed under ESA protection. Three additional populations have been classified as "species of concern," and thus

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back to Seattle because of the ease of shipping and processing from that port. Most Washington commercial salmon fishermen now have permits and fish in Southeast Alaska. This would mask reduced productivity from Washington State's own river systems. Additionally, there are many large hatcheries in operation on the Columbia River, which contribute a large number of north-migrating hatchery-origin fish to the Washington State ocean salmon fishery – again likely artificially masking wild salmonid declines in that state.

subject to potential ESA listings at a later date if their numbers do not improve.[10]

Declines of once-important salmon runs in the Pacific Northwest can disrupt and close down economically valuable ocean commercial salmon fisheries in either or both of two ways.[11] One way is when the fish originally expected are simply not there. Another way is that since both strong and weak populations of salmonids can intermingle at sea, "weak stock management" population conservation rules administered under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891d, for federally managed fisheries often require the weakest stock to become the "limiting factor" on harvest of *all other intermingling stocks.*

Thus whenever *even one* intermingling salmonid stock becomes so depressed that it enters a "zero harvest" regime necessary to prevent even more serious

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[10] *See* NMFS, ESA Salmon Listings. Available at: www.nwr.noaa.gov/ESA-Salmon-Listings/upload/1-pgr-8-11.pdf (providing complete and updated list of the ESA listings for various salmonid populations in the Pacific Northwest). *See also* NMFS, Salmonid Range Maps. Available at: www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Maps/Index.cfm (providing range maps of the various ESA-listed salmonid population groups, known as "evolutionarily significant units" or ESUs by NMFS).

[11] Steelhead and searun cutthroat are not commercially harvested species and so are not included in commercial harvest numbers in this section. Hence the term "salmon" here refers only to commercially harvested ocean-going salmonid species such as chinook, coho, sockeye, pinks and chum.

declines, that "weak link" can result in the total early closure of *all nearby* (much more abundant) ocean commercial salmon fisheries. In practice, ocean commercial fisheries that even accidentally might impact weakened salmon stocks are usually shut down *many years before* an ESA listing is imposed, under this "weak stock management" requirement.[12]

Even in some non-salmon ocean fisheries, too high an accidental catch rate (called "bycatch") of nearby non-targeted salmon can still trigger the total or partial closure of otherwise completely unrelated fisheries – even for very different species. For instance, some west coast ocean ground fish harvests are now restricted because of the potential for accidental catch of ESA-listed salmonids that may by chance be migrating through that area at that time. And once a depressed wild salmonid stock becomes ESA-listed, of course, there is *further* need to rigorously protect and avoid even accidentally impacting those ESA-listed fish stocks during regular fishing seasons under the same "weak stock management" principles – as well as under the ESA.

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[12] For instance, well before ESA protections became necessary for the depressed Southern Oregon/Northern California Coho (SONCC) population, local ocean salmon fisheries were closed down to protect this very weak stock. California commercial fishing on this stock in northern California and southern Oregon was terminated under the Magnuson-Stevens Act in 1992, but the ESA listing for that SONCC stock was not imposed until 1997. *See* 62 Fed. Reg. 24588-24609 (May 6, 1997). Commercial fishing was thus no longer a significant factor in its declines.

There has been considerable effort to mitigate commercial harvest losses by artificially producing non-ESA listed hatchery-bred salmonids in mitigation hatcheries. But since wild salmon also intermingle freely with hatchery-origin fish within the oceans, closures intended to protect ESA-listed wild stocks will still frequently close down otherwise abundant hatchery-origin fish harvest opportunities throughout much of the Pacific Northwest. In addition, hatcheries are no solution to poor river conditions; indeed, hatchery-origin fish will also die *en mass* in-river, both as juveniles and returning adults, if high sediment and turbidity levels are too extreme.

As a further measure of the economic declines in the fishing industry caused by widespread salmon population declines in northern California and the Pacific Northwest, in 1982 there were 5,964 commercial salmon vessel permits issued in California by its Department of Fish and Game. By 2011, there were only 1,167 such permits outstanding – a decline of 80%. In Oregon, there were 3,646 commercial salmon boat permits issued in 1982, but by 2011 only 1,003 remained – a 72% fleet loss. And in both states today only a fraction of those remaining boats can actually participate in severely depressed commercial ocean salmon fisheries.[13]

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[13] Pacific Fishery Management Council, *Review of 2011 ocean salmon fisheries* (2012) at Tables D-4 (California), D-5 (Oregon). Available at: www.pcouncil.org/wp-content/uploads/salsafe_2011.pdf.

IV. WIDESPREAD SEDIMENT POLLUTION IS A MAJOR FACTOR IN POOR RIVER HEALTH IN BOTH OREGON AND NORTHERN CALIFORNIA.

Clean Water Act section 303(d), 33 U.S.C. § 1313(d), requires states to periodically identify waters of the state that do not meet certain minimum water quality standards. California and Oregon have both developed 303(d) "impaired waters" lists for sediment pollution which they keep relatively current. Much of this information can now be accessed online on a state-by-state basis through the EPA's new "Assessment TMDL Tracking And Implementation System (ATTAINS)" database and website.[14]

Coastal Northern California: It is complex to determine the major sources of water pollution in California, in part because this large state contains so many geographic areas, each with its own types of impacts. However, California's 2010 Integrated Report on its 303(d) list of water quality limited streams in that state was approved by EPA on October 11, 2011, and contains the latest official data on California's 303(d)-listed water quality limited streams.

According to that 2010 California 303(d) list, and trying to assess just the impacts of logging road sediments on salmon runs by looking *only* at the California North Coast Regional Water Quality Control

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[14] *See* EPA, ATTAINS website, www.epa.gov/waters/ir.

Board's jurisdiction,[15] there are an estimated 17,478 stream miles now listed in that coastal forested area under the Clean Water Act as "water quality limited" *specifically* for sediment and/or siltation, much of which has been specifically attributed or traced (at least in part) to local watershed silvicultural operations, including eroding logging roads.[16]

Oregon: As of the 2006 Clean Water Act 303(d) listing information reported for Oregon, EPA's ATTAINS database notes that 12,248.8 stream miles and 88,562.2 acres (138.38 square miles) of Oregon lakes, reservoirs and ponds were 303(d) listed as "water quality impaired" for either sediment or turbidity or both.[17] Not all these areas are heavily logged, but the upper portions of most of these watersheds are generally heavily forested and intensive industrial logging is the most common land use in those areas.

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[15] The California North Coast Regional Water Quality Control Board's jurisdiction includes the counties of Del Norte, Glenn, Humboldt, Lake, Marin, Mendocino, Modoc, Siskiyou, Sonoma, and Trinity counties. These are areas of the state where most commercial logging and most of its salmon-bearing streams both occur, but little agriculture.

[16] *See* California 303(d) list, www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2010.shtml.

[17] *See* EPA, *Oregon Water Quality Assessment Report*, http://ofmpub.epa.gov/waters10/attains_state.control?p_state=OR.

V. LOGGING ROAD SEDIMENT DIRECTLY DAMAGES NORTHWEST SALMON HARVESTS.

In 2009, EPA reported that for all the nation's rivers and streams surveyed to date (about 16%) sediment was the seventh, and closely related turbidity was the tenth, leading source of water quality impairment to rivers and streams nationwide – and if considered together would be the third largest source.[18] In EPA's ATTAINS database, that agency currently lists sedimentation as the "cause of impairment" for 106,057 river and stream miles, and 718,144 acres (1,122.1 square miles) of lakes, reservoirs and ponds nationwide, exclusive of the Great Lakes.[19] The EPA database also identifies "silviculture (forestry)" as the probable source of impairment for at least 19,444 miles of the nation's threatened or impaired streams and 242,583 acres (379.04 square miles) of its lakes, reservoirs and ponds.[20]

A number of scientific studies have found strong negative correlations between logging road density and salmon productivity.[21] In a number of specific

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[18] EPA, 2009, *National Water Quality Inventory: 2004 Report to Congress*, EPA-841-R-08-001 (Jan. 2009). Available at: http://water.epa.gov/lawsregs/guidance/cwa/305b/2004report_index.cfm.

[19] *See* EPA, *National Causes of Impairment*, http://ofmpub.epa.gov/waters10/attains_nation_cy.control#causes.

[20] 77 Fed. Reg. 30473, 30476 (May 23, 2012).

[21] *See, e.g.*, NMFS, *Scientific conclusions of the state review for Oregon coast coho salmon (Oncorhynchus kisutch)* (June 2012),

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salmonid ESA listings, the threats to the listed species from excessive sediments coming from industrial logging roads has also been identified as a major factor in their decline. For instance, the ESA listing as "threatened" of Southern Oregon/Northern California (SONCC) coho salmon was based in part on such sediment impacts. That May 6, 1997, "threatened" listing decision noted:

> Forestry has degraded coho salmon habitat through removal and disturbance of natural vegetation, disturbance and compaction of soils, *construction of roads, and installation of culverts*. Timber harvest activities can result in sediment delivered to streams through mass wasting and surface erosion that can elevate the level of fine sediments in spawning gravels and fill the substrate interstices inhabited by invertebrates. . . . The most pervasive cumulative effect of past forest practices on habitats for anadromous salmonids has been an overall reduction of habitat complexity from loss of multiple habitat components. *Habitat complexity has declined principally because of reduced size and frequency of pools due to filling with sediment* and loss of LWD [large woody

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at 76-78. Available at: www.nwfsc.noaa.gov/assets/25/8714_08132012_121939_SROregonCohoTM118WebFinal.pdf. *See also* Firman, Julie C., *et al.*, *Landscape models of adult coho salmon density examined at four spatial extents*, TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY, 140:2, 440-455 (2011). Available at: http://dx.doi.org/10.1080/00028487.2011.567854.

> debris]. . . . *As previously mentioned, sedimentation of stream beds has been implicated as a principal cause of declining salmonid populations throughout their range. . . . Several studies have indicated that, in this region, catastrophic erosion and subsequent stream sedimentation (such as during the 1955 and 1964 floods) resulted from areas which had been clearcut or which had roads constructed on unstable soils*" (emphasis added).[22]

In another instance, the most recent ESA relisting of the Oregon Coastal (OC) Coho Salmon population in particular directly implicates intensive local logging practices as a major factor in their decline, explaining that "historical and ongoing timber harvest and road building have reduced stream shade, increased fine sediment levels, reduced levels of in-stream large wood, and altered watershed hydrology."[23] NMFS also noted in that relisting decision that Oregon's Forest Practices Act, which governs commercial logging practices on all privately and state owned timberlands (which includes most of Oregon's coastal forests), does not adequately prevent these kinds of impacts:

> Although the Oregon Forest Practices Act and the Forest Practice Rules generally have become more protective of riparian and aquatic

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[22] 62 Fed. Reg. 24588, at 24593 and 24599 (May 6, 1997) (emphasis added, internal citations omitted).

[23] 76 Fed. Reg. 35755, 35766 (June 20, 2011).

> habitats over time, significant concerns remain over their ability to adequately protect water quality and salmon habitat. In particular, disagreements continue over: (1) whether the widths of RMAs [riparian management areas] are sufficient to fully protect riparian functions and stream habitats; (2) whether operations allowed within RMAs will degrade stream habitats; (3) operations on high-risk landslide sites; and (4) watershed-scale effects. Based on the available information, we were unable to conclude that the Oregon Forest Practices Act adequately protects OC coho habitat in all circumstances. On some streams, forestry operations conducted in compliance with this act are likely to reduce stream shade, slow the recruitment of large woody debris, and add fine sediments. Since there are no limitations on cumulative watershed effects, road density on private forest lands, which is high throughout the range of this ESU, is unlikely to decrease."[24]

NMFS has also systematically delineated the many factors pushing ESA-listed salmon runs in the Pacific Northwest (particularly northern California and Oregon) ever closer to extinction, and in its report *Factors Contributing to the Decline of Chinook Salmon*, issued in June 1998, has in particular noted:

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[24] *Id.* at 35767.

> Timber harvesting *and associated road building* occur throughout the region on Federal, state, tribal, and private lands. These activities *increase sedimentation and debris flows* and reduce cover and shade resulting in aggradation, embedded spawning gravel, and increased water temperatures (emphasis added).[25]

The 1998 *Factors* report specifically identified logging operation impacts (which includes road building) as a major factor in the declines of 9 out of 15 distinct west coast chinook salmon populations analyzed, including all those in heavily forested coastal areas or within the Northwest's major forested river watersheds.[26] Of those chinook populations analyzed, five of these distinct chinook populations are now ESA-listed.[27]

In an earlier NMFS *Factors for Decline* report from 1996, this time concerning the underlying causes of various *steelhead* ESA-listings, NMFS also

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[25] NMFS, *Factors contributing to the decline of chinook salmon: an addendum to the 1996 west coast steelhead factors for decline report* (June 1998). Available at: www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Reports-and-Publications/upload/chnk-ffd.pdf.

[26] *Id.* at Table 1, 67-69.

[27] Listed populations are identified as Puget Sound, Lower Columbia River, Upper Willamette River, Snake River Fall-run and Snake River Spring/Summer-run chinook populations. *See* 70 Fed. Reg. 37160 (June 28, 2005).

discussed the role of sediment pollution in those populations' declines:

> In general, effects of sedimentation on salmonids are well documented and include: clogging and abrasion of gills and other respiratory surfaces; adhering to the chorion or eggs; providing conditions conductive to entry and persistence of disease-related organisms; inducing behavioral modifications; entombing different life stages; altering water chemistry by adsorption of chemicals; affecting useable habitat by scouring and filling pools and riffles and changing bedload composition; reducing photosynthetic growth and primary production; and affecting intergravel permeability and dissolved oxygen levels.[28]

Increased water turbidity, which impedes light penetration, also has a major negative impact on salmonid survival rates, and is in turn directly related to increased sediment loads. The 1996 *Factors for Decline* report further explains:

> Increased turbidity decreases photosynthesis of aquatic plants and can clog the respiratory surfaces and feeding mechanisms of aquatic animals. Turbidity results when fine silt,

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[28] NMFS, *Factors for decline: a supplement to the notice of determination for west coast steelhead under the Endangered Species Act*, National Marine Fisheries Service (NMFS) (August, 1996). Accessed Oct. 12, 2012 at: www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Reports-and-Publications/upload/stlhd-ffd.pdf. Quote from 17.

> part of the overall sediment transport, remains suspended for long periods of time. Turbidity causes light to be scattered and absorbed, reducing light penetration and thus diminishing or even eliminating aquatic plant growth. Loss of aquatic plants leads to the loss of associated snails and aquatic invertebrates [that] serve as a food source for young fish. . . . Sedimentation has also been shown to increase stream temperature. . . .
>
> Accelerated rates of erosion and sedimentation are a consequence of most forest land management activities. *Road networks in many upland areas of the Pacific Northwest are the most important source of management-accelerated sediment delivery to anadromous fish habitats. The sediment contribution to streams from roads is often much greater than that from all other land management activities combined (Gibbon and Salo, 1973)* (emphasis added).[29]

The 1996 *Factors for Decline* report concerning steelhead also specifically identified logging operation impacts (including road building) as a major factor in the declines of 11 out of 15 distinct steelhead

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[29] *Id.* at 17-19; *see also* Gibbons, Dave R., Salo, Ernest O., *An annotated bibliography of the effects of logging on fish of the western United States and Canada*, GEN. TECH. REP. PNW-GTR-010 (1973), U.S. Department of Agriculture, Forest Service, Pacific Northwest Forest and Range Experiment Station, Portland, OR. Available at: www.treesearch.fs.fed.us/pubs/22556.

populations it analyzed. Today all 11 of those populations are ESA-listed.[30]

Canadian researchers estimated the loss in salmon-related economic values arising from the impacts on coastal forests of "consumptive uses such as logging and resource extraction." The resulting values for habitat ranged from $0.26 to $1.40 per acre of watershed, or $1,491 to $7,914 per mile of spawning stream (converted to 2003 U.S. dollars), which the authors also considered likely to be a very conservative estimate.[31]

In another study on economic losses to salmon fisheries caused by industrial logging and associated road building, researchers also noted significant economic losses from these causes, finding that:

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[30] Listed steelhead populations include: Upper Columbia River; Snake River Basin; Middle Columbia River; Lower Columbia River; Upper Willamette River; South-Central California Coast; Central California Coast; Northern California; California Central Valley; and Oregon Coast. *See* 72 Fed. Reg. 834 (January 5, 2006). The Puget Sound population, in which logging also plays a role, was subsequently also listed. 72 Fed. Reg. 26722 (May 11, 2007). The Southern California population of steelhead was also listed on January 5, 2006, but urbanization rather than logging impacts were implicated in that run's declines.

[31] Knowler, D.J., B.W. MacGregor, M.J. Bradford, and R.M. Peterman, *Valuing freshwater salmon habitat on the west coast of Canada*, JOURNAL OF ENVIRONMENTAL MANAGEMENT, 69: 261-273 (Nov. 2003). Available at: www.sciencedirect.com/science/article/pii/S0301479703001543.

> [s]ubstantial losses in anadromous fish benefits result from logging on just 21% of the land within the Siuslaw NF. In particular, the Current Direction and the Timber Benchmark alternatives result in [commercial fishing] losses over the 30-year planning period of approximately $1.55 million and $1.67 million, respectively, compared to the Minimum Management (no timber harvesting or road building) alternative. . . . Thus, while improved timber harvesting practices of leaving buffer strips and use of better road design have reduced the extent of fisheries losses, there still are substantial 'unavoidable' losses associated with timber harvesting.[32]

Similarly, other studies assessing the total socio-economic costs *versus* benefits to society as a whole of improved commercial logging rules (such as requiring larger riparian buffer zones between salmon-bearing streams and logging roads to protect against sediment) make clear that in many cases the increased net economic value to west coast salmon fisheries *far outweighs* the much smaller economic costs to timber owners from mere reductions in riparian zone logging. For instance, one more recent study found:

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[32] Loomis, J. B., *The bioeconomic effects of timber harvesting on recreational and commercial salmon and steelhead fishing: a case study of the Siuslaw National Forest*, MARINE RESOURCE ECONOMICS, Vol. 5; 43-60, at 56 (1988). Available at: http://agecon search.umn.edu/bitstream/48449/2/8175753.pdf.

> Another useful comparison entails recognizing that salmon habitat acts like financial assets, generating a flow of economic benefits over time. Evidence from the past decade indicates that, if habitat improvements resulting from salmon-related logging restrictions generated one additional fish for the recreational fishery per year per acre for the foreseeable future, the asset value of the habitat would be about $2,800 per acre.
>
> By comparison, the average timber-asset value of state and private lands used for growing timber in Oregon is about $400 per acre in Western Oregon, and the average value of land plus standing timber is about $4,000 per acre. Values are less east of the Cascade.
>
> Thus, if logging restrictions converted one acre of private or state land from producing timber to producing one salmon per year for the recreational fishery, the asset value of the new salmon habitat would be about seven times the forgone timber-asset value of the land, alone.[33]

In short, reducing the net economic "externality" damages to other natural resources (such as valuable

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[33] ECONorthwest, *Salmon, timber, and the economy*, ECONorthwest (Dec. 1999), at ii-iii. Available at: http://pacificrivers.org/science-research/resources-publications/salmon-timber-and-the-economy-the-potential-economic-consequences-of-restricting-logging-to-save-oregon2019s-salmon. Numbers in 1999 dollars.

salmon fisheries) from industrial logging, including minimizing widespread sedimentation from its extensive networks of private logging roads, can – and often does – result in many more net economic *gains* to society as a whole than economic *losses*.

VI. MANY OTHER INDUSTRIES ARE ALSO ADVERSELY AFFECTED BY LOGGING ROAD SEDIMENT POLLUTION.

The commercial salmon fishing industry is only one of many industries that are economically damaged by excessive river sediments and accompanying elevated water turbidity. Among those industrial sectors most affected are the following:

Lower River Navigation and Reservoir-Related Economic Costs: Lower watershed debris catch basins, navigable river segments, and reservoirs are natural sinks for sediment to accumulate. Economists have long known that these impacts can cause multiple economic losses:

> Sedimentation of river channels and harbors can cause delays in shipping and even the loss of vessels. . . . Reservoirs make excellent sediment traps. Flow water can carry large loads of sediment in suspension. When a river's flow is checked by a reservoir, the carrying capacity of the river is greatly reduced, and sediment settles out into the storage basin. Without removal and with a continuous inflow of sediment-laden water, the reservoir will eventually fill with sediment. . . .

> A reservoir can provide one or more services such as flood control, drinking water supply, hydroelectric generation, and recreation. The economic costs from sedimentation take three forms: effects on the services provided by the reservoir (such as boating and irrigation), costs of remediation (dredging), and damage to the reservoir structures itself (turbines, pumps). Benefits from reduced sedimentation are the reverse of the above effects.[34]

In looking at upper watershed debris loads and excessive soil erosion from the Los Angeles National Forests, for instance, records of sediment discharge to debris basins were collected for 41 watersheds along the southern flank of the San Gabriel Mountains of Los Angeles County. Major cost savings from reduced annual sediment loads came from decreased costs for Los Angeles County Public Works to clean out these basins. The average cost across all 41 basins for 1969 to 1995 was nearly $12 per cubic yard (in 2000 dollars), with costs ranging from $2.48 to $32 per cubic yard, putting a major strain on city maintenance budgets.[35]

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[34] Ribaudo, M.O. and D. Hellerstein, *Estimating water quality benefits: theoretical and methodological issues*, USDA TECHNICAL BULLETIN NO. 1808 (1992), at 16-17. Available at: http://ageconsearch.umn.edu/bitstream/33586/1/tb921808.pdf.

[35] Gonzalez-Caban, *et al.*, *Costs and benefits of reducing sediment production from wildfires through prescribed burning: the Kinneloa Fire case study*, 241-52, PROCEEDINGS OF THE SECOND INTERNATIONAL SYMPOSIUM ON FIRE ECONOMICS, PLANNING, AND POLICY: A GLOBAL VIEW, GENERAL TECHNICAL REPORT 208 (2008).

(Continued on following page)

Municipal Water Treatment: The mechanisms by which increased river sedimentation increases costs of water treatment are also well known:

> Rivers and reservoirs provide drinking water to over 112 million U.S. residents. Water treatment processes are affected by the quality of the source water. Conventional treatment can consist of flocculation, sedimentation, filtration, and disinfection. Intake water with low levels of suspended sediment may be treated by direct filtration, which eliminates the need for sedimentation and, sometimes, flocculation. Cost savings from the use of direct filtration include lower capital costs and lower costs associated with lower chemical coagulant doses and decreased sludge production and disposal. Low turbidity levels also simplify the disinfection process, thus making it less costly. . . . The change in water production cost induced by changes in sediment load is a measure of the welfare effects from soil conservation.[36]

Actual instances of high sediment surges driving up municipal water treatment costs abound. For instance, in 1996 the City of Salem, Oregon, had to disrupt supplies of water to its customers because high levels of river sediment later traced to logging

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Available at: www.fs.fed.us/psw/publications/documents/psw_gtr208en/psw_gtr208en_241-252_gonzalez-caban.pdf.

[36] Ribaudo, M.O. and D. Hellerstein, 1992, *supra*, pg. 20 (internal citations omitted).

roads overwhelmed the capabilities of its water treatment facility. This caused its water users to incur short-run damages totaling $3.4 million to $4.4 million (in 1996 dollars). Installing a water-treatment system capable of handling such high sediment levels in the future was estimated to increase customer costs by about $13-$24 (in 1996 dollars) per capita, per year.[37]

In other examples from Oregon, another water treatment economic costs study has noted:

> [T]he average daily cost of sediment was $75.84, or $20.00 per million gallons of water treated for the City of Corvallis. The 'average annual municipal cost' of turbidity in source water for all communities in the Willamette Valley is $1,015,472. '[A] total average of $4.22 million a year is estimated to be spent on sediment-related road maintenance.' The sum of the annual municipal, road-maintenance, and hydroelectric generating costs of sediment in the Willamette Valley is $5.5 million.[38]

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[37] Hulse, D., G. Grant, E. Niemi, A. Branscomb, D. Diethelm, R. Ulrich, and E. Whitelaw, *Muddy waters: how floods clarify evolving relationships among landscape processes and resource management decision-making in municipal watersheds*, EPA/NSF Final Project Report GAD#R825822, Department of Landscape Architecture, University of Oregon, Eugene, Oregon (2002). Available at: www.fsl.orst.edu/wpg/pubs/Muddy%20Waters%20full.pdf.

[38] Moore, W.B. and B.A. McCarl, *Off-site costs of soil erosion: a case study in the Willamette Valley*, WESTERN JOURNAL OF AGRICULTURAL ECONOMICS. 12(1):42-49 (1987). Available at: http://ageconsearch.umn.edu/bitstream/32477/1/12010042.pdf.

The Commercial Timber Industry: Within the timber industry itself, it is well recognized that conserving often thin forest topsoils results in better tree growth. Additionally, controlling sediment at any point in a logging road network will prevent sediment buildups that can block hydrologically lower culverts (causing often cascading road blowouts), or trigger flooding washouts on lower portions of other logging roads.

> When soil is eroded from a field, it can be deposited in roadside ditches, which line many rural roadways. Sedimentation in culverts and ditches reduces the capacity and the effectiveness of the structures, increasing the likelihood of road flooding during storms. The costs from ditch sedimentation are the maintenance costs of removing sediment plus the damage from road flooding.[39]

Simply put, preventing logging road erosion *saves the timber industry money*. These economic savings from lowered road maintenance costs alone may well offset (or exceed) any added costs of NPDES permit-required sediment controls.

General Industrial and Societal Costs of Sediment Pollution: There are many additional adverse economic impacts from sediment pollution on

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[39] Ribaudo, M.O. and D. Hellerstein, 1992, *supra*, pg. 21. While this study referenced primarily agricultural lands, its findings also apply to silviculture.

many industries (and on society as a whole), as many studies have noted.

> Soil erosion and resulting sedimentation can lead to clogged drainage-ways and suspended sediment in rivers. Erosion, sedimentation and/or deposition directly or indirectly increase costs to society in terms of facility maintenance (*e.g.*, ditch cleaning), facility replacement (*e.g.*, building new dams), erosion mitigation (*e.g.*, increased water purification), and/or effect prevention (*e.g.*, sediment settling ponds). In addition, soil erosion processes may influence income by altering production or input requirements. For example, farmers whose lands are inundated by sediment-laden rivers may find an increase in passive fertilization and/or crop acreage damaged by deposition.[40]

Models and data at the U.S. Department of Agriculture have also estimated the value of the economic benefits from 13 categories of reductions in water-driven soil erosion on agricultural lands.[41] These values are also applicable to erosion on non-agricultural lands, to the extent that it results in similar delivery of sediment to streams with similar

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[40] Moore, W.B. and B.A. McCarl, 1987, *supra*, pg. 1.

[41] Hansen, L. and M. Ribaudo, *Economic measures of soil conservation benefits: regional values for policy assessment*, TECHNICAL BULLETIN 1922 (2008), USDA, Economic Research Service. Accessed October 10, 2012, from: www.ers.usda.gov/Publications/TB1922/TB1922.pdf.

environmental consequences.[42] Those economic values ranged up to $8.81/ton of soil displaced (in 2000 dollars).[43] Soil erosion in the U.S. has also been estimated in another study to occur at the rate of about 30 tons per hectare per year. Multiplied by even small per ton economic loss rates, total national economic losses through soil erosion alone are thus *about $44 billion annually.*[44]

In short, minimizing the harmful effects of soil erosion on the nation's water ways makes excellent economic sense. Initially, society as a whole benefits through reduction of environmental damage costs to valuable economic resources and industries often far downstream. Additionally, in this case the timber industry otherwise generating this erosion may also benefit by lowering its own expenditures on maintenance of logging roads and associated ditches, culverts, and other conveyances for discharging stormwater.

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[42] Hansen, L. and M. Ribaudo (2008), *id.*, at 5-6.

[43] Hansen, L. and M. Ribaudo (2008), *id.*, Table at 4.

[44] See Pimentel, David, *et al.*, *Environmental and economic costs of soil erosion and conservation benefits*, SCIENCE, 267:1117-1123 (Feb. 24, 1995). Although most of this total U.S. soil erosion derives from agriculture, silviculture in the western U.S. is also a major source. Accessed Oct. 12, 2012, at: www.rachel.org/files/document/Environmental_and_Economic_Costs_of_Soil_Erosi.pdf.

CONCLUSION

Because the regulation of stormwater discharges to water ways from industrial logging road constructed culverts and drainage ditches through the NPDES program is entirely consistent with the overarching CWA objective of ensuring that those who benefit from degrading the nation's water ways cannot shift the costs of their polluting activities to downstream industries and economic interests, the ruling below should be affirmed.

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 11-338, 11-347

In the
Supreme Court of the United States

DOUG DECKER, in His Official Capacity as Oregon State Forester, *et al.*, *Petitioners*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*, *Respondents*.

GEORGIA-PACIFIC WEST, INC., *et al.*, *Petitioners*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER., *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, *et al.*, IN SUPPORT OF PETITIONERS

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ALABAMA FORESTRY ASSOCIATION, AMERICAN LOGGERS COUNCIL, ASSOCIATED LOGGING CONTRACTORS-IDAHO, ASSOCIATED OREGON LOGGERS, BUCKEYE CONSERVANCY, CALIFORNIA FORESTRY ASSOCIATION, FOREST LANDOWNERS ASSOCIATION, KENTUCKY FOREST INDUSTRIES ASSOCIATION, MISSOURI FOREST PRODUCTS ASSOCIATION, NORTH CAROLINA FORESTRY ASSOCIATION, NORTHERN ARIZONA LOGGERS ASSOCIATION, OHIO FORESTRY ASSOCIATION, OREGON WOMEN IN TIMBER, SOUTHEASTERN LUMBER MANUFACTURERS ASSOCIATION, TEXAS FORESTRY ASSOCIATION, TREATED WOOD COUNCIL, VIRGINIA FOREST PRODUCTS ASSOCIATION, AND WASHINGTON CONTRACT LOGGERS ASSOCIATION.

QUESTIONS PRESENTED

(1) Congress has authorized citizens dissatisfied with the Environmental Protection Agency's (EPA's) rules implementing the Clean Water Act's (CWA's) National Pollution Discharge Elimination System (NPDES) permitting program to seek judicial review of those rules in the Courts of Appeals. *See* 33 U.S.C. § 1369(b). Congress further specified that those rules cannot be challenged in any civil or criminal enforcement proceeding. Consistent with the terms of the statute, multiple circuit courts have held that if a rule is reviewable under 33 U.S.C. § 1369, it is exclusively reviewable under that statute and cannot be challenged in another proceeding.

Did the Ninth Circuit err when, in conflict with those circuits, it held that a citizen may bypass judicial review of an NPDES permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the CWA?

(2) In 33 U.S.C. § 1342(p), Congress required NPDES permits for stormwater discharges "associated with industrial activity," and delegated to EPA the responsibility to determine what activities qualified as "industrial" for purposes of the permitting program. EPA determined that stormwater from logging roads and other specified silvicultural activities is non-industrial stormwater that does not require an NPDES permit. *See* 40 C.F.R. § 122.26(b)(14).

Did the Ninth Circuit err when it held that stormwater from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater?

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IDENTITY AND INTEREST OF AMICI CURIAE

The Amici respectfully submit this brief in support of Petitioners Oregon State Forester Doug Decker, *et al.*, 11-338, and Georgia-Pacific West, Inc., *et al.*, 11-347 (consolidated).[1]

The Amici organizations represent forest land owners, wood producers, conservationists, educators, and other interested groups from around the country. Many of the Amici are involved in developing, using, or maintaining forest roads.

Pacific Legal Foundation was founded almost 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and a reasonable and balanced approach to environmental regulation. PLF attorneys acted as lead counsel in the

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[1] In accordance with Supreme Court Rule 37, all parties have been notified of the Amici's intent to participate in this case and all parties have consented to the filing of this brief. Acknowledgments of consent have been filed with the Clerk of the Court.

Additionally, pursuant to Supreme Court Rule 37.6, the Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici, their members, or their counsel have made a monetary contribution to the brief's preparation or submission.

Clean Water Act cases *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and *Rapanos v. United States*, 547 U.S. 715 (2006). PLF attorneys also participated as amicus in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009), and *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). PLF has experience with the issues raised in this case, having participated as amicus in the proceedings below. *Nw. Envtl. Def. Ctr. v. Brown*, Case No. 07-35266 (9th Cir. May 17, 2011) (Dkt. 67, 98).

The Alabama Forestry Association was organized in 1949 to promote good stewardship of renewable forest resources for the benefit of the nation. The Association pursues this goal through public outreach, safety training, industry communications, legislative advocacy, and policy development. The Association has more than 1,800 dues-paying members, including landowners, foresters, trucking companies, and wood product producers. The Association represents Alabama's largest industry that supports over 400,000 forest land owners with an estimated $15 billion in products from over 650 producers.

The American Loggers Council was formed in 1994 to serve as a national voice for professional loggers. The Council is made up of a coalition of regional and state logging associations and councils, represents more than 50,000 employees, and reaches over 10,000 logging contractors. Through networking and outreach, the Council seeks to enhance the logging profession and further sustainable forestry practices.

Associated Logging Contractors-Idaho is a trade organization of logging contractors. It currently has close to 400 logging contractor businesses as members and an additional 100 associate members who are

affiliated with the timber industry and logging contractors. Its member companies are small, family-owned, or closely held businesses that operate on the forest lands of Idaho. Many are multi-generational businesses with close ties to the land and their communities. The Idaho forest industry makes up 4.6% of the total labor income in the state and produces $2 billion in annual sales of primary wood and paper products. The forest industry is an essential component of school funding in rural areas where unemployment exceeds 20%.

Associated Oregon Loggers represents approximately 1,000 contract logging companies and businesses associated with the logging industry in the State of Oregon. Its members are primarily small, family-owned businesses, many of which are owned and managed by second, third, and even fourth generations of loggers. Members rely on a long-established transportation system (including forest roads) to move logs and other forest products from the woods to processing mills and other destinations.

The Buckeye Conservancy is an organization of family farm, ranch, and forest landowners and resource managers in the North Coast region of California. The Conservancy is dedicated to the promotion, communication, and implementation of those ideals and policies that support the ecological and economic sustainability of natural resources and open space in family ownership.

The California Forestry Association is a nonprofit, nonpartisan organization dedicated to sustainable uses of renewable resources and responsible forestry. Association membership includes forest land owners, forestry professionals, loggers, manufacturers,

wholesalers, and retailers who are engaged in the production and distribution of wood products. These members own 3.8 million of the 7.4 million acres of private forest land in California and are committed to protecting and enhancing the natural life cycle of California's forests. They also supply wood resources by contracting to purchase and harvest significant amounts of timber from public lands, including the national forests.

The Forest Landowners Association was established in 1941 to provide its members with education, information, and national grassroots advocacy, which enables them to sustain their forest lands across generations. Association members own and operate more than 40 million acres of forest land in 48 states. Through outreach on behalf of private forest land owners nationwide, the Association seeks to enhance forest land management and stewardship. The Association also provides advice, support, and information to policymakers, educating them on how proposed legislation could affect private forest management, stewardship, and owners' rights.

The Kentucky Forest Industries Association was organized in 1965 to promote the economic welfare and interests of Kentucky's wood industry by advocating conservation and sustainable forest use, and by working with agencies to promote the forest industry. The Association has a wide range of members (approximately 600) including landowners, sawmills, loggers, flooring companies, insurance companies, financial institutions, heavy equipment companies, and numerous other support industries. Association members directly employ over 20,000 people with a large impact on Kentucky's economy.

The Missouri Forest Products Association was established in 1970 to encourage the wise use and conservation of the nation's resources through education and issue advocacy. The Association has over 300 members, comprised primarily of wood processing mills and logging businesses. Association members contribute more than $4 billion directly to the economy with between $10-$12 billion in induced benefits.

The North Carolina Forestry Association was organized in 1911. The Association actively promotes healthy, productive forests by supporting the efforts of forest land owners and forestry-related businesses that responsibly manage or use forests and produce wood and paper products. The Association is primarily engaged in legislative and regulatory advocacy, environmental education, logger training, and public outreach. The Association has approximately 4,000 members, including forest land owners, forest managers, wood suppliers and loggers, and producers of wood and paper products. Forest products is North Carolina's largest manufacturing industry, providing over 68,000 jobs with an annual economic impact of $23 billion affecting more than 180,000 jobs. Forest lands in North Carolina cover more than 18 million acres (59% of the state).

The Northern Arizona Loggers Association was formed in 1975 to promote forest industry professionalism, knowledge, and safety, primarily through training and education. The Association has numerous members made up of logging contractors and suppliers. Most are family-owned businesses vital to local rural economies. The Association reports that a proposed 750,000-acre forest restoration project could

be undermined if NPDES permits are required for the estimated 2,000 miles of related forest roads.

The Ohio Forestry Association was founded in 1903 and became a trade association in 2008. The Association's mission is to support the management of Ohio's forest resources and improvement of business conditions for the benefit of forestry-related industries and enterprises, including the hardwood industry, logging companies, sawmills, pulp and paper mills, hardwood brokers, equipment sellers, consulting companies, foresters, and landowners. To that end, the Association engages in policy and legislative advocacy, education, and outreach. The Association manages the Ohio Master Logging Company Certification Program, which is an outgrowth of Ohio's response to dealing with pollution. The Association works closely with state and local agencies to deal with voluntary compliance mechanisms and all participants believe the current approach is addressing Ohio's needs. A 2005 report by the Ohio Division of Forestry and Ohio State University showed that Ohio's wood and fiber industry contributed $15.1 billion to Ohio's economy and employed 119,000 people with a payroll of $4 billion.

Oregon Women in Timber was organized in 1979 to create awareness and appreciation for the value of trees, and to encourage understanding about protection, management, and conservation of renewable forest resources. These goals are furthered through education programs in schools that provide instruction on ecology, forest management practices, and the use of wood products. Members consist of women associated with loggers, foresters, landowners, and others who are concerned about forest

management. Oregon Women in Timber is an active participant in Oregon Women for Agriculture and American Agri-Women.

The Southeastern Lumber Manufacturers Association is a trade organization established in 1962 to promote family-owned lumber businesses. The Association represents lumber manufacturers in 17 states, primarily in the South. With emphasis on government affairs, marketing and management, and operational issues, the Association offers programs to support independent lumber manufacturers.

The Texas Forestry Association was founded in 1914 to enhance and perpetuate Texas forest resources through tree planting, education, training, and political action. The Association has approximately 2,855 members, which include private landowners, professional loggers, consulting foresters, and processing mills. In East Texas alone, forest lands are 94% privately owned and cover more than 12 million acres. Forestry is a major industry in Texas.

The Treated Wood Council was established in 2003 to serve all segments of the treated wood industry in government affairs. The current membership is approximately 500 and includes wood product suppliers, wood preservative suppliers, wood treaters, and related organizations throughout the country. Member businesses have a $4.5 billion impact on the national economy and supply approximately 15,000 direct jobs.

The Virginia Forest Products Association was founded in 1958 to support and advance Virginia's lumber and wood products industry through public education and legislative and regulatory advocacy.

The Association has more than 200 members, primarily small businesses, and represents those who produce lumber and wood products in the Commonwealth of Virginia, as well as those companies that provide goods and services to these producers. Association members produce the majority of the lumber and wood products manufactured in Virginia. Virginia's forest industry ranks as one of the commonwealth's largest manufacturing sectors. A recent study by the Weldon Cooper Center found that Virginia forests provide more than $27.5 billion in annual benefits.

Washington Contract Loggers Association is a trade association that represents over 700 logging companies in Washington State. Association members either own forest land, log for small forest land owners, or purchase standing timber from private or public landowners. The use of forest roads is vital to the logging industry in the State of Washington.

The Amici oppose the expansion of federal permitting for forest road runoff that the Ninth Circuit's opinion will bring about if it is affirmed. Because of their experience and informed perspective on the issues, the Amici believe that this brief will aid the Court in deciding this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Northwest Environmental Defense Center (NEDC) wants the federal government to impose expansive new permitting requirements on millions of forest land owners and timber harvesters across the country by making forest road runoff a point source pollutant under the Clean Water Act's National

Pollution Discharge Elimination System (NPDES). The Court should not grant NEDC's wish. The "Silviculture Rule" lists activities that are exempt from NPDES permitting, including "*non-point source* silvicultural activities such as . . . surface drainage, or road construction and maintenance from which there is natural runoff."[2] 40 C.F.R. § 122.27(b)(1) (emphasis added). The Silviculture Rule codifies, as applied to forest roads, the Clean Water Act's regulatory distinction between point source discharges, which are generally subject to NPDES permitting; and non-point source discharges, which are exempt. *See* 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12); *see also Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004); *League of Wilderness Defenders / Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002) (defining "non-point source pollution" as "the type of pollution that arises from many dispersed activities over large areas"). Until the Ninth Circuit's decision below, it was understood that runoff from forest roads was non-point source in character and therefore exempt from NPDES permitting under the Silviculture Rule.

If the Court requires EPA to begin administering NPDES permits for forest road runoff, it will displace long-established state water quality programs, upset

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[2] The other activities listed in the Silviculture Rule, which are subject to NPDES permitting, but which are not at issue in this case, are deemed "silvicultural point sources," and are "any discernable, confined and discrete conveyance[s] related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States." 40 C.F.R. § 122.27(b)(1).

current federal permitting practices, and imperil timber harvesting operations throughout the United States. But none of this is necessary because any pollution created by forest road runoff is already being addressed through state best management practices. The Amici respectfully urge this Court to reverse the Ninth Circuit's decision and hold that forest road runoff is exempt from NPDES permitting.

ARGUMENT

I

REQUIRING NPDES PERMITS FOR FOREST ROAD RUNOFF WILL INTERFERE WITH SUCCESSFUL STATE-SPECIFIC BEST MANAGEMENT PRACTICES

Extending the NPDES to cover forest road runoff is not necessary to protect water resources. Rainwater runoff from forest roads has been regulated for decades as non-point source pollution, minimized through time-tested "best management practices" (BMPs) at the state level, including drainage standards that prevent sediment from spilling into water bodies. *See* 33 U.S.C. § 1329; *see, e.g.*, Kevin Bold, *et al.*, *A Case Study of an Erosion Control Practice: The Broad-Based Dip 65* (2007) ("One [practice to control runoff] is the construction of cross drainage structures designed to efficiently drain water off the road prism in order to control the erosion potential of water collecting on the road surface.").[3]

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[3] Available at http://nrs.fs.fed.us/pubs/jrnl/2007/nrs_2007_bold_001.pdf (last visited Aug. 17, 2012).

The government and tree harvesters alike have found this state-based system of BMPs to be efficacious. A survey performed by researchers with the U.S. Forest Service demonstrates that, since 2000, at least 48 states have implemented their own individualized BMPs for controlling non-point source runoff associated with silviculture. Pamela J. Edwards & Gordon W. Stuart, *State Survey of Silviculture Nonpoint Source Programs: A Comparison of the 2000 Northeastern and National Results, N. J. Applied Forestry* 19(3), 122 (Sept. 2002).[4] There are now over 150 state laws nationwide that address non-point source pollution from silviculture, and compliance averages around 86%. *Id.* at 123-24.

Empirical evidence corroborates the reported success of BMPs—EPA does not list forestry among the leading sources of pollution to lakes, estuaries, or wetlands, due to the effectiveness of BMP programs:

> Much of forestry's success in pollution control is attributable to its early (beginning about 1972) and continued use of BMPs and compliance monitoring, and its recent emphasis on education and training. Although many states have similar BMP practices, development of BMPs at the state level has allowed states more ownership and support for their implementation, improved compliance, avoided a one-size-fits-all approach, fostered more creativity and flexibility, and addressed local conditions.

Id. at 126.

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[4] Available at http://nrs.fs.fed.us/pubs/jrnl/2002/ne_2002_edwards_001.pdf (last visited Aug. 17, 2012).

Pertinent to this case, Oregon has its own policies for safeguarding against pollution that might occur as a result of harvesting trees. Those laws include Oregon's Forest Practices Act, Or. Rev. Stat. § 527.610, *et seq.*, under which the Oregon Board of Forestry has promulgated water protection rules, Or. Admin. R. 629-635-0000, *et seq.* And those rules establish practices which place high priority on the preservation of water quality. *See, e.g.*, Or. Admin. R. 629-635-0100(7)(a) ("The protection goal for water quality . . . is to ensure through the described forest practices that, to the maximum extent practicable, non-point source discharges of pollutants resulting from forest operations do not impair the achievement and maintenance of the water quality standards.").

Forcing all forest roads, wherever located, to come under the same NPDES permitting program would unsettle the regulatory systems already in place in Oregon and other states, and could lead to negative consequences as a result of imposing a uniform regulatory scheme on non-uniform timber harvesting conditions among the states.

II

REQUIRING NPDES PERMITS FOR FOREST ROADS WILL CREATE TREMENDOUS COSTS AND DELAY

A. Including Forest Roads in the NPDES Will Result in a Significant Increase in the Number of NPDES Applications

If, despite the proven success of BMPs, this Court determines that forest road runoff must come within the ambit of the NPDES, then EPA will be forced to develop a permitting program for rainwater on forest

roads. *See* 33 U.S.C. § 1342. That program could be developed on a per-harvest, per-landowner, or per-discharge basis. But no matter how it is structured, it will mean that the Amici and millions of forest land owners and operators across the nation will face new, possibly insurmountable, regulatory obstacles, including unprecedented delay in the permitting process caused by a massive increase in the number of new permits that will be required.

1. Per Harvest

According to Forest Resources of the United States, there are 423 million acres of private forest land in the United States, controlled by about 11 million owners. W. Brad Smith *et al.*, *Forest Resources of the United States, 2007*, at 20 (United States Forest Serv. 2009).[5] Over 90% of those owners are individuals or unincorporated entities. *Id.* Those individuals and small businesses control about 62% of all private forest land, amounting to approximately 264 million acres nationwide. *Id.* Of those 264 million acres, 58% are used for commercial timber harvesting. *Id.* That means there are about 150 million acres of family-owned forest land in the United States used for tree harvesting.

Assuming that an average tree harvest encompasses 200 acres, and that each harvest would require access to forest roads having some form of drainage system, there are 750,000 (150 million divided by 200) potential tree harvest sites for which an NPDES permit may be necessary.

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[5] Available at http://www.fs.fed.us/nrs/pubs/gtr/gtr_wo78.pdf (last visited Aug. 17, 2012).

2. Per Landowner

Alternatively, NPDES permitting could be required on a per-landowner basis. A recent report summarizing the U.S. Forest Service's National Woodland Owner Survey shows that 46% of family forest land owners harvested or removed trees from some or all of their land between 2002 and 2006. *See* Brett J. Butler, *Family Forest Owners of the United States*, 2006, at 21 (U.S. Forest Serv. 2008).[6] If those owners continue to use their land for tree harvesting, and each tree harvest requires access to forest roads having some form of water conveyance, then there are about 5-6 million (roughly half of 11 million) forest land owners who will be required to obtain an NPDES permit if forest road runoff is covered under that program.

3. Per Discharge

Yet even predicting the impact of NPDES permitting on a per-harvest or per-landowner basis fails to paint the full picture. The impact could be analyzed in terms of the number of potential rainwater conveyances for which specific effluent limitations may have to be established as part of the NPDES permitting process. *See*, 33 U.S.C. § 1311(e) ("Effluent limitations . . . shall be applied to all point sources of discharge of pollutants . . . ."). If the ratio of one mile of forest road per square mile of forest land is used as a national average, then there are approximately

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[6] Available at http://nrs.fs.fed.us/pubs/gtr/gtr_nrs27.pdf (last visited Aug. 17, 2012).

264 million miles of forest roads on private forest land.[7] Again, assuming an average ratio of one water conveyance per mile of road, the estimated total number of conveyances requiring an NPDES permit would be 264 million.

4. Summary

Construing the NPDES to cover forest road runoff would result in an unprecedented increase in NPDES permit applications. Each state would be significantly affected, and at a national level, the Amici estimate that a forest road NPDES program would create at least an additional 750,000 permit applications, based on the number of tree harvests, 5 million permit applications, based on the number of affected landowners, or 264 million new point source discharges requiring permits. Cumulatively, such a program would place a crushing burden on the owners and operators that would be subject to it, as well substantially expand the NPDES program well beyond its current bounds, without express direction from Congress.

B. Including Forest Roads in the NPDES Will Result in Skyrocketing Costs and Intolerable Delay for Timber Harvesters

Imposing an NPDES permitting obligation for forest roads would overwhelm EPA and make it nearly impossible for forest land owners to obtain needed permits in a timely manner. The Amici estimate that

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[7] This is probably a conservative estimate. According to informal survey data gathered from the members of Amicus California Forestry Association, there are approximately 6 miles of forest road per square mile of forest land in California.

there are approximately 400,000 NPDES permits currently being administered by EPA, based on agency data made available to the public. *See* EPA, *Protecting the Nation's Waters Through Effective NPDES Permits: A Strategic Plan 1* (2001).[8] As outlined above, the number of new NPDES permits required *for forest roads alone* would exceed the total number of all NPDES permits currently administered.

The costs imposed by all of those new permits would be great. As this Court noted in 2006, the cost required at that time to obtain similar "dredge and fill" permits was already staggering at $271,596 for an individual permit, and $28,915 for a nationwide permit, not counting costs of mitigation or design changes. *Rapanos*, 547 U.S. at 721 (plurality opinion).

In terms of the costs that would be caused by delay, a worthwhile lesson can be drawn from EPA's experience in issuing a general rainwater discharge permit for shipping vessels, which was the direct result of litigation. *See Nw. Envtl. Advocates v. EPA*, No. C 03-05760 SI, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal., Mar. 30, 2005). EPA needed over two years to create that program, which has a much smaller scope than a program covering forest road runoff would have.[9] How much time would the agency need to put together a

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[8] Available at http://www.epa.gov/npdes/pubs/strategicplan.pdf (last visited Aug. 17, 2012).

[9] For a history of the development of EPA's vessel discharge program, visit http://cfpub.epa.gov/npdes/vessels/background.cfm (last visited Aug. 17, 2012). EPA estimates that approximately 70,000 total vessels will be affected by the vessel discharge permit program.

permitting program for over 250 million potential discharging sources on forest roads?

One thing is certain: While the agency struggled to produce a new permitting program, forest road owners and operators would be put in an impossible position—continue with business as usual and run the risk of becoming a defendant in a Clean Water Act citizen suit, or stop using forest roads and abandon their livelihoods.

CONCLUSION

The Amici respectfully request that this Court reverse the Ninth Circuit's opinion, which held that rainwater running off of forest roads must be treated as point source pollution under the NPDES. The Silviculture Rule exempting forest road runoff from inclusion in the NPDES sensibly excludes non-point source discharges from a permitting regime designed to control point source discharges of pollutants. Bringing forest roads under the NPDES would lead to a substantial increase in the number of permit applications that the government would have to process, while EPA does not have a program in place that could accommodate such an increase. Finally, extending the NPDES to cover forest road runoff would probably result in little environmental improvement, yet it would create an ungainly regulatory scheme that would disrupt successful state-tailored water quality programs which are already being enforced.

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DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE RUFFED GROUSE SOCIETY IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF THE RUFFED GROUSE SOCIETY

Pursuant to Supreme Court Rule 37.2 the Ruffed Grouse Society (sometimes hereinafter "the Society") respectfully submits this brief on behalf of itself and its members, in support of Petitioners as *amicus curiae*.[1]

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The Society, established in 1961, has 15,476 members across the United States and Canada, representing some 113 local chapters.[2] The Society is the only non-profit wildlife conservation organization dedicated to promoting conditions favorable for ruffed grouse, american woodcock, 43 species of neo-tropical songbirds, and other associated early forest wildlife in order to sustain our hunting tradition and outdoor heritage.

Proper management of the public and private forests is critical to the Society and the wildlife for

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[1] The parties have consented to the filing of this *amicus curiae* brief by filing blanket consents with this Court. *See id.* Pursuant to Supreme Court Rule 37.6, no party, or counsel for a party, made a monetary contribution intended to fund the preparation or submission of the brief. No one other than the *amicus*, their members, and their counsel made such a contribution.

[2] http://www.ruffedgrousesociety.org/.

which it advocates. The Society employs five regional biologists and a Director of Conservation Policy who provide scientific guidance and comments on state and federal rulemaking, programmatic management plans and site-specific projects. The Society's Management Area Program, initiated in 1985, provides technical and financial assistance to public land management agencies to assist in the conservation of early successional forest habitat. There are currently over 600 projects in 28 states, encompassing more than 500,000 acres. Also, through its Coverts program, the Society funds research and provides workshops, assistance and education to private landowners covering millions of acres of private forests. The Society and its members have a direct interest in the outcome of this case because a shift in the legal and regulatory conditions will impact the access and habitat maintenance that the Society supports.

STATEMENT OF THE CASE

The Clean Water Act (the "Act") prohibits the discharge of a "pollutant" into waters of the United States from a "point source" without a National Pollutant Discharge Elimination System ("NPDES") permit.[3] The Act defines a "point source" as "any discernible, confined and discrete conveyance, including

[3] 33 U.S.C. §§ 1311(a), 1342.

but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged."[4] The Act expressly exempts "agricultural stormwater discharges and return flows from irrigated agriculture" from the definition of "point source." It does not define "agricultural stormwater" or "nonpoint sources."

In 1976 the EPA initially promulgated the Silvicultural Rule, which defines a class of activities as silvicultural point sources, and interprets nonpoint source silvicultural activities as outside the NPDES program.[5] It limits silvicultural point sources to "rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States."[6] Not included as a point source are "non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, *or road construction and maintenance from which there is natural runoff.*"[7]

This case began when the Respondent filed suit against the Oregon Board of Forestry, an Oregon

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[4] 33 U.S.C. § 1362(14).

[5] 40 C.F.R. § 122.27(b)(1); *see also* 45 Fed. Reg. at 33,446-47.

[6] *Id.*

[7] *Id.* (emphasis added).

forester, and various private entities that had been involved in timber harvesting operations. The suit was brought as a Clean Water Act citizen suit arguing that the Petitioners failed to obtain a NPDES permit for channeled stormwater runoff from certain forest access roads as required by 33 U.S.C. § 1362(p). The Petitioners responded by claiming the Silviculture Rule, established in 40 C.F.R. 122.27, exempted those logging roads from the NPDES permit requirement. The district court agreed that the Rule applied and dismissed the complaint on that basis.

On appeal, the Ninth Circuit Court of Appeals reversed finding that because the Silviculture Rule exempted stormwater and other natural runoff that was controlled, channeled, or discretely conveyed, the Act's definition of a point source in § 1362(14) and the EPA's Rule were irreconcilable.[8] Therefore, the Ninth Circuit invalidated the Silviculture Rule holding that the EPA did not have the authority to override the will of Congress as unambiguously expressed in § 1362(14).[9]

SUMMARY OF THE ARGUMENT

1. The decision below endangers the viability of ruffed grouse, American woodcock and other associated

[8] *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1078-80 (9th Cir. 2011).

[9] *Id.*

wildlife by creating serious economic disincentives for the creation of young forest habitat. If upheld, the decision will negatively affect the ability of the *amicus* and its public and private partners to continue active forest management in order to create early successional forest habitat.

2. The court of appeals's willingness to entertain this challenge to the Siliviculture Rule is an example of judicial overreaching. Congress, in passing the Clean Water Act, expressly limited review of EPA administrative rulemaking to 120 days from promulgation. That period long passed as it relates to the 36-year-old Silviculture Rule. In addition, Congress further specified that any challenges to such EPA rules be brought as an original action in the circuit court of appeals. Despite the passage of time and the incorrect forum, the court of appeals allowed a private interest group to resurrect a time-barred challenge to this EPA rule in the context of a citizen enforcement action. The court of appeals was able to arrive at the merits by declaring an ambiguity in the Rule created only by a subsequent *amicus* brief filed by the United States. This Court should reverse the judgment, because the court of appeals ignored clear Congressional limitations on its judicial review and because such a precedent will create regulatory uncertainty and place any number of longstanding exemptions in jeopardy.

ARGUMENT

I. THE DECISION BELOW THREATENS THE CONTINUED VIABILITY OF EARLY-SUCCESSIONAL FOREST SPECIES.

A. Wildlife Dependent Upon Early Successional Habitat Are Already Threatened By Declining Habitat.

By its nature, early successional or young forest is ephemeral. Currently, early successional habitat and its dependent species are in decline. Early successional forest is defined by an open leaf canopy, which allows sufficient sunlight penetration to the forest floor to support the growth of certain tree, shrub and grass species that cannot survive in a mature, closed canopy forest. Furthermore, early successional animal species find food and shelter among the young shrubs and saplings that thrive in recently harvested areas. In order to sustain the full array of forest wildlife, we must sustain the full array of forest habitats; very young forests, very old forests, and all ages in between.

Data from the USDA-Forest Service demonstrates the extreme decline of the availability of young forest habitat on federal forest lands.[10] Throughout the northeastern and northcentral United States, young forest habitats have decreased by 45% over the past 25-30 years despite the fact that total forest land has

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[10] US Forest Service Forest Inventory and Analysis Database, available at: http://fia.fs.fed.us/tools-data/other/default.asp.

increased by 5%.[11] In virtually every region of eastern North America the amount of open habitat has diminished.[12] Habitats that have declined in area by more than 98% include grassland, savanna, and shrubland communities.[13] Early successional habitat consisting of seedling-sapling stands now represent the smallest portion of forest lands in northeastern (e.g., Massachusetts: 4%) and north-central (e.g., Illinois: 3%) states.[14]

As young forest land diminishes, so too does the wildlife that it feeds and shelters. Many bird species that depend upon young forest habitats are experiencing dramatic population declines due to the loss of these habitats.[15] Disconcertingly, since 1966, 53% of the bird species that breed in young forest habitats have declined.[16] In February 2007, the American Bird

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[11] *Id.*

[12] Robert A. Askins, *Sustaining Biological Diversity in Early Successional Communities: The Challenge of Managing Unpopular Habitat,* Wildlife Society Bulletin, Vol. 29, No. 2 (Summer, 2001), p. 407.

[13] *Id.*

[14] John A. Litvaitis, *Importance of Early Successional Habitats to Mammals in Eastern Forests,* Wildlife Society Bulletin, Vol. 29, No. 2 (Summer, 2001), p. 467.

[15] W.C. Hunter, D.A. Buehler, R.A. Canterbury, J.L. Confer and P.B. Hamel, *Conservation of Disturbance-dependent Birds in Eastern North America.* Wildlife Society Bulletin, Vol. 29 pp. 440-455 (2001).

[16] US Fish and Wildlife Service Breeding Bird Survey Database available at: http://www.mbr-pwrc.usgs.gov/bbs/bbs.html.

Conservancy classified early successional, deciduous forest habitat in the eastern United States as one of the nation's 20 most threatened bird habitats. Birds of young forest habitats in the eastern United States that are currently federally listed under the Endangered Species Act include the Kirtland's warbler (*Dendroica kirtlandii*) and black-capped vireo (*Vireo atricapilla*) and the Florida scrub jay (*Aphelocoma coerulescens*). Game birds like the ruffed grouse (*Bonasa umbellus*), the most popular upland game bird throughout much of its range, the American woodcock (*Scolopax minor*), and bobwhite quail (*Colinus virginianus*) are experiencing similar population declines. Approximately 92% of the range of the ruffed grouse occurs in areas where aspen, an early successional species, is an important component of the forest.[17] The loss of young forest habitat is the predominant cause of these declines.[18] The high stem densities that characterize early-successional habitats allow for ideal cover from predators and the lush

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[17] Todd M. Fearer, F. Stauffer, *Relationship of Ruffed Grouse (Bonasa umbellus) Home Range Size to Landscape Characteristics*. American Midland Naturalist, Vol. 150, No. 1, p. 104 (Jul., 2003).

[18] Daniel R. Dessecker and Daniel G. McAuley, *Importance of early successional habitat to ruffed grouse and American woodcock*. Wildlife Society Bulletin 29:456-465 (2001); *and* T.R. Cooper and K. Parker, *American woodcock population status, 2012* US Fish and Wildlife Service, Laurel, MD available at: http://www.fws.gov/migratorybirds/NewReportsPublications/PopulationStatus/Woodcock/2012%20American%20Woodcock%20Population%20Status,%202012.pdf.

herbaceous vegetation provides abundant forage for many species of wildlife, enabling population growth that cannot be obtained in mature forests.[19] To ensure the survival of these species, young forest habitats must be sustained on the landscape through silvicultural treatments and other mechanical means implemented at regular intervals. There are no other viable management alternatives.

B. Silvicultural And Active Management Practices Have Been Shown To Increase The Habitat And Population Size Of Early Successional Species.

Today, silvicultural treatments and other forms of active forest management are the only means of maintaining young forest habitats. Historically, young forest land was created through ecological disturbances of natural and human origin.[20] Prior to European settlement, the disturbance regime included fires of natural and Native American origin, windstorms, drought, flooding, insect and disease

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[19] Erik G. Endrulat, Scott R. McWilliams and Brian C. Tefft, *Habitat Selection and Home Range Size of Ruffed Grouse in Rhode Island*, Northeastern Naturalist, Vol. 12, No. 4, p. 411 (2005).

[20] Jeffrey D. Brawn, Scott K. Robinson and Frank R. Thompson III, *The Role of Disturbance in the Ecology and Conservation of Birds*, Annual Review of Ecology and Systematics, Vol. 32 (2001).

outbreaks, and beaver (Castor canadensis) activity.[21] Later, the abandonment of eastern farmlands during westward expansion allowed the generation of young forest habitat though plant succession. Environmental disturbances play a fundamental role in maintaining the natural heterogeneity of vegetation and vegetation age classes.[22] However, human activity including extensive fire suppression, insecticide application, and agricultural and urban expansion has disrupted the natural disturbance cycle relied on for young forest creation.[23] As these historical natural disturbances have declined, the amount of young forest habitat and its dependent wildlife species have also declined.

Today, in lieu of a regime of natural disturbance, silviculture and other forms of active forest management have become the primary agents of early successional forest creation.[24] To ensure a continuous

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[21] Margaret K. Trani, Robert T. Brooks, Thomas L. Schmidt, Victor A. Rudis and Christine M. Gabbard, *Patterns and Trends of Early Successional Forests in the Eastern United States*, Wildlife Society Bulletin, Vol. 29, No. 2, p. 413 (Summer, 2001).

[22] Jeffrey D. Brawn, Scott K. Robinson and Frank R. Thompson III, *The Role of Disturbance in the Ecology and Conservation of Birds*, Annual Review of Ecology and Systematics, Vol. 32 (2001), p. 252.

[23] Charles B. Halpern and Thomas A. Spies, *Plant Species Diversity in Natural and Managed Forests of the Pacific Northwest*, Ecological Applications, Vol. 5, No. 4, p. 914 (Nov., 1995).

[24] Robert T. Brooks, *Abundance, distribution, trends and ownership patterns of early successional forests in the northeastern United States*, Forest Ecology and Management 185, 2003,

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supply of young forest habitat on the landscape, commercial forest management practices must be implemented approximately every ten years.[25] Timber harvests implemented at regular intervals have displayed a benefit to many early successional species.[26] Even-aged treatments, which remove most of the mature trees in a particular stand at the same time, have been shown to be a key feature enabling increased bird species diversity.[27] Specifically, in the Missouri Ozark, the Kentucky warbler, black-and-white warbler, and worm-eating warbler reached their highest population densities in post-harvest forests where even-age silvicultural treatments were the primary form of silviculture.[28] In a long-term

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available at: http://www.fs.fed.us/ne/newtown_square/publications/other_publishers/OCR/ne_2003_brooks001.pdf.

[25] Daniel R. Dessecker and Daniel G. McAuley, *Importance of Early successional habitat to ruffed grouse and american woodcock*, Wildlife Society Bulletin, Vol. 29 (2), p. 460 (2001).

[26] John M. Hagan, Peter S. McKinley, Amy L. Meehan, Stacie L. Grove, *Diversity and Abundance of Landbirds in a Northeastern Industrial Forest*, The Journal of Wildlife Management, Vol. 61, No. 3, pp. 718-735 (Jul., 1997).

[27] Richard H. Yahner, *Effects of Habitat Patchiness Created by a Ruffed Grouse Management Plan on Breeding Bird Communities*, American Midland Naturalist, Vol. 111, No. 2, p. 409 (Apr., 1984).

[28] Frank R. Thompson, III, William D. Dijak, Thomas G. Kulowiec and David A. Hamilton, *Breeding Bird Populations in Missouri Ozark Forests with and without Clearcutting*, The Journal of Wildlife Management, Vol. 56, No. 1, p. 28 (Jan., 1992); *and* Michael J. Wallendorf, Paul A. Porneluzi, Wendy K. Gram, Richard L. Clawson and John Faaborg, *Bird Response to*

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study of the effects of silvicultural practices on ruffed grouse and other bird species, abundance and diversity increased in young forest stands that were recently regenerated using these even-age treatments.[29] While managing early successional forests undoubtedly supports its attendant species, such active management creates a mosaic of forest habitats that also benefit mature forest species.[30] Ultimately, science-based forest management, which includes silvicultural treatments, is science-based wildlife management.

C. Requiring Npdes Stormwater Permits For Forest Roads Will Have Adverse Economic Effects On Landowners, Industry, And State Agencies And Will Place Significant New Barriers Upon Active Forest Management.

Federally owned forests lands, like the National Forests, managed by the United States Forest Service, are bounded by dozens of federal laws and regulations, which "ha[ve] kept the agency from effectively addressing rapid declines in forest

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Clear Cutting in Missouri Ozark Forests, The Journal of Wildlife Management, Vol. 71, No. 6, p. 1903 (Aug., 2007).

[29] Richard H. Yahner, *Responses of Bird Communities to Early Successional Habitat in a Managed Landscape*, The Wilson Bulletin, Vol. 115, No. 3, p. 292 (Sep., 2003).

[30] Richard H. Yahner, *Effects of Habitat Patchiness Created by a Ruffed Grouse Management Plan on Breeding Bird Communities*, American Midland Naturalist, Vol. 111, No. 2, p. 409 (Apr., 1984).

health."[31] The Forest Service refers to this dilemma "analysis paralysis" or "the process predicament."[32] Unfortunately, the decision below would only cause that predicament to spread to all State, Tribal and private forests.

Private forests account for over 427 million acres owned by over 10 million private owners.[33] The briefs filed by the commercial logging industry make it clear that the permitting requirements will cause widespread economic harm as their members are forced to scale back their operations. However, the burden of NPDES permitting requirements should not be taken lightly and will not be borne exclusively by industry. Non-industrial, small tract forest owners will be the hardest hit under any potential expansion of NPDES permitting of forest access roads. These small private forest landowners collectively own 72% of the forestland in the eastern United States.[34] They depend on a return from forest products to provide an

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[31] USDA Forest Service, The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management, p. 5 (2002) (http://www.fs.fed.us/projects/documents/Process-Predicament.pdf).

[32] *Id.* at p. 21.

[33] National Alliance of Forest Owners, *Working Forests*, available at: http://nafoalliance.org/policy-issues/working-forests/ – accessed on July 18, 2012.

[34] W.B. Smith, J.S. Vissage, D.R. Darr and R.S. Sheffield, *Forest Resources of the United States, 1997: General Technical Report NC-219*, US Department of Agriculture, Forest Service, North Central Research Station (2001).

economic incentive to actively manage their forests. The estimated cost of an NPDES permit on a single private landowner is $24,000.[35] In addition to requiring Best Management Practices ("BMPs"), an NPDES permit would require forest owners to obtain a Stormwater Management Plan, prepared by a qualified professional, specifying site-by-site controls and detailing a mentoring and inspection routine.[36] Compliance is mandatory and subject to both substantial government enforcement penalties and private citizen suits under the Clean Water Act. While managers of industrial forest lands are well versed in federal- and state-level permitting processes, non-industrial private forest landowners have little knowledge of, or expertise with these processes. Most small landowners would need to hire or develop internal staff to perform and write analyses or outside consultants to prepare necessary documents.[37] Adding an NPDES permit requirement for these small private forest owners would provide a disincentive so significant

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[35] Frederick Cubbage and Robert Abt, *Potential Administrative and Economic Impacts of NPDES Permit Requirements for Forest Roads in the South* (Dec. 7, 2011) available at: http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-South1.pdf.

[36] *See generally* George G. Ice, Erik Schilling and Jeff Vowell, *Trends for Forestry Best Management Practices Implementation*, Journal of Forestry (Sept. 2010) available at: http://nafoalliance.org/wp-content/uploads/JOF-9-10-BMP.pdf.

[37] Cubbage at 7.

that only the most savvy and wealthy owners could possibly afford to continue operations.

NPDES permitting for stormwater runoff from forest access roads will raise costs directly and indirectly for those parties seeking permits, as well as the state or federal agencies granting such permits. One study, estimating the effects on thirteen southern states, describes the increased costs to forest owners as "punitive," and coupled with existing property taxes would at times exceed the value of annual timber growth.[38] Aggregate costs for landowners, procurement dealers, loggers, and forest products firms in these states range from $420 million to $4 billion.[39] State agencies would see an increased cost of as much as $1 million annually in small states alone.[40] Indeed, one study concludes that small tract private timberland owners would be the hardest hit by any of the [permitting] scenarios and costs for permitting on a per acre basis are negatively correlated with parcel size.[41] In Maine alone, Stevens estimated the cost of initial permitting of the 6.1

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[38] *Id.* at 3.

[39] *Id.*

[40] *Id.*

[41] D. Stevens, *Report: Estimated cost impacts of ruling change for forest roads in the state of Maine* (2011), available at: http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-Maine-Northeast-Lake-States ("This predicts that under any of the three [permitting] scenarios smaller tract owners will either pay more per acre for permitting, or be the first to stop harvesting after new rules are promulgated.").

million acres of small tract private timberland to be of equal or greater total magnitude than the 9.5 million acres held by large tract landowners.[42] As a result, Cubbage estimates that net timber sales returns for a typical 32 acre tract would suffer a decrease of 71%, while larger tracts of 80 acres would lose 19% of net timber sales returns.[43]

For many landowners these new cost barriers will be prohibitive. By increasing the scope and scale of the permitting process, this decision will contribute to the decline of an already shrinking wildlife habitat that relies upon continued forest management of both public and private forest owners. This decision will compound the ecological dangers discussed above with additional barriers to adequate forest management. The stakes could not be higher for early successional forest species. Experience has shown that the thoughtful implementation of state BMPs designed to meet site-specific conditions effectively controls stormwater discharges from forest roads. Excessive regulatory oversight of stormwater discharges from forest roads will only diminish the likelihood that these landowners will initiate the active forest management required to sustain wildlife of young forest habitats. A downturn in active forest management on state and private lands, combined with the bitter administrative logjam that plagues the National

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[42] Stevens at 4.

[43] Cubbage at 3.

Forest system will only speed up the demise of early successional forest habitats and could result in sufficient declines of many bird species to warrant federal listing under the Endangered Species Act.

II. THE DECISION BELOW IGNORES AN EXPRESS CONGRESSIONAL LIMITATION UPON JUDICIAL REVIEW, WHICH, IF UPHELD, WOULD RESULT IN REGULATORY CHAOS.

A. The Court Of Appeals Did, In Fact, Invalidate The EPA's Silvicultural Rule.

As a threshold matter, this Court should recognize that the court of appeals did implicitly invalidate the Silvicultural Rule. Under the Rule "road construction and maintenance from which there is natural runoff" are defined as "nonpoint sources" such that NPDES permits are not required. By contrast, the court of appeals rejected this definition and held that "stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts and channels *is* a point source discharge for which an NPDES permit is required." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1087 (9th Cir. 2011) (emphasis added).

In its *amicus* brief opposing certiorari the United States argued that "the court of appeals did not expressly or implicitly invalidate the Silivicultural

Rule."[44] It argued that the court of appeals merely chose between two competing interpretations of the rule. However, to characterize the court of appeals' holding as mere "interpretation" of the Rule is simply inaccurate. Instead, the court of appeals effort to redefine a silvicultural point source can only be seen as an implicit declaration that the Silvilcultural Rule was invalid as written.

In *Environmental Defense. v. Duke Energy Corp.*, this Court addressed the Fourth Circuit's claim that it did not invalidate the EPA's Prevention of Significant Deterioration ("PSD") regulations under the Clean Air Act ("CAA").[45] The EPA filed an enforcement action against Duke Energy for failing to obtain a permit after its replacement of 29 tube assemblies.[46] Duke argued that it did not need to obtain a permit because its work did not constitute a "major modification" as defined by the 1980 PSD regulations.[47] The court of appeals eventually agreed with Duke's position and held that the EPA lacked authority to interpret the term "modification" differently in the PSD regulations as it had in the New Source Performance

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[44] Brief for United States as *Amicus Curiae* Opposing Certiorari at p. 8 (May 24, 2012).

[45] *Envt'l Def. v. Duke Energy Corp.*, 549 U.S. 561, 573, 127 S. Ct. 1423, 1432, 167 L. Ed. 2d 295 (2007).

[46] *Id.* at 570-71.

[47] *Id.* at 571.

Standards.[48] However, this Court reversed, holding that the Fourth Circuit improperly entertained a challenge to the PSD regulations, outside of the judicial review limitations upon EPA regulations contained within the CAA.[49]

Just as in *Duke Energy*, the Ninth Circuit's "interpretation" of the Silvicultural Rule crossed the line from a "purposeful but permissible reading of the regulation" to one that "can only be seen as an implicit declaration that the . . . regulations were invalid as written."[50] Therefore, as a threshold matter, this Court should conclude in accordance with *Duke Energy* that the court of appeals did, in fact, invalidate the EPA's Silvicultural Rule at issue.

B. The "Arising After" Exception To 33 U.S.C. § 1369(b)(1) Does Not Apply Because The Silvicultural Rule Is Unambiguous.

Time limitations on judicial review of agency regulations are jurisdictional in nature.[51] The Clean Water Act contains important limitations to judicial review of regulations like the Silviculture Rule.

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[48] *Id.* at 572; *see also United States v. Duke Energy Corp.*, 411 F.3d 539, 549 (4th Cir. 2005).

[49] *Id.* at 581.

[50] *Id.* at 573.

[51] *Nat'l Min. Ass'n v. U.S. Dept. of Interior*, 70 F.3d 1345 (D.C. Cir. 1995).

Section 1369(b)(1) requires that any challenges to the EPA Administrator's actions must be brought within 120 days of such action. By contrast, this case was filed as a private civil enforcement action under 33 U.S.C. § 1365(a)(1), which allows private actions to be filed in the district courts against persons who are alleged to be in violation of the effluent standards or limitations, including NPDES permits. However, the Act limits the scope of challenges that may be brought as a private enforcement action. Specifically, any action that could have been brought under § 1369(b)(2) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." These limitations upon judicial review are central to this case.

To maintain its subject matter jurisdiction under 33 U.S.C. § 1365(a) as constrained by the limitations of § 1369(b), the court of appeals couched its decision in terms of "interpretation" as opposed to outright "invalidation" of the Silvicultural Rule. In doing so, it determined that the Rule was "susceptible to two different readings" in order to apply the statute's "arising after" exclusion. *Brown*, 640 F.3d at 1068. "Under one reading," wrote the court, "the Rule does not require permits for silviculture stormwater run-off." *Id.* at 1068. According to the court of appeals, it was this reading that the United States "adopted . . . for the first time in its initial *amicus* brief in this case." *Id.* As such, because the court concluded that the *amicus* brief constituted a new interpretation of the Rule, it held that the "arising after" exception

contained within § 1369(b)(1) applied, thereby allowing it to proceed to the merits.[52]

The court of appeals erred when it concluded that the *amicus* brief created an ambiguity in the Rule. Under a plain reading of the Rule, the EPA has exempted silvicultural activities such as "harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff" from the definition of a point source. 40 C.F.R. § 122.27(b)(1). Rightly or wrongly, the Rule's text clearly excludes the logging roads at issue from being defined as a point source. There simply is no ambiguity.

At the very least, the Silvicultural Rule as originally promulgated and applied over the years by the EPA provided the public "adequate notice that it could be interpreted as the [EPA] now does." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*[53] Contrary to the court of appeals' conclusion, the present interpretation of Rule as not requiring NPDES permits is not new. The EPA asserted the same interpretation of the Rule in *Envtl. Def. Ctr., Inc. v. U.S. E.P.A.* ("EPA promulgated silviculture regulations in 1976 that exclude from NPDES permit requirements certain

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[52] Assuming, *arguendo*, that ambiguity exists such that the "arising after" exclusion applies, the challenge then should have been dismissed as falling within the exclusive original jurisdiction of the court of appeals. 33 U.S.C. § 1369(b)(1)(E)-(F).

[53] 117 F.3d 579, 585 (D.C. Cir. 1997).

silvicultural activities that EPA determined constitute non-point source activities, including "surface drainage, or road construction and maintenance from which there is natural runoff.").[54] Likewise, in *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.* the EPA informed the district court that it had authority to determine whether certain silvicultural sources were nonpoint and therefore not subject to the NPDES program.[55] In its motion for summary judgment in that case the EPA wrote:

> In sum, in section 122.27, EPA distinguished between point source silvicultural activities, which are subjected to the permitting system, and nonpoint source silvicultural activities, which do not require NPDES permits. Because the CWA clearly provides EPA with the discretionary authority to make this distinction, promulgation of the regulation at issue was within EPA's authority. . . .[56]

The initial position of the United States in this case similarly acknowledged the regulation's clarity.[57] Even the Respondents had little difficulty identifying

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[54] 344 F.3d 832, 861 (9th Cir. 2003).

[55] 266 F. Supp. 2d 1101, 1112 (N.D. Cal. 2003).

[56] *Id.* Civil Case No. 3:01-cv-02821-MHP, Doc. 118 at 19 (Sept. 5, 2003).

[57] "The plain language of EPA's silviculture regulations, promulgated over thirty years ago, exclude runoff from forest roads from the requirement to obtain an NPDES permit." U.S. *Amicus* Brief at 18, *NEDC v. Brown*, No. 306-CV-01270 (D. Or., filed Dec. 6, 2006).

the position of the EPA in its First Amended Complaint without the benefit of the later *amicus* brief.[58]

In spite of the apparent clarity over the Rule's exclusion of logging roads from the definition of a silvicultural point source, the court of appeals announced that "[u]ntil the United States filed that brief, there was no way for the public to know which reading of the Silvicultural Rule it would adopt." 640 F.3d at 1069. Despite this pronouncement, the interpretation the United States advanced in its *amicus* brief is entirely consistent with its past views. As this Court previously explained, "where the text of a regulation is unambiguous, a conflicting agency interpretation advanced in an *amicus* brief will necessarily be 'plainly erroneous or inconsistent with the regulation' in question." *Chase Bank USA, N.A. v. McCoy*.[59] To the extent the United States' second *amicus* brief in this case can be construed to create an ambiguity, the Court should freely disregard the brief as inconsistent with the otherwise unambiguous Silvicultural Rule. It follows then that because the Rule is unambiguous, the court of appeals' decision to entertain a challenge to the 36-year-old Rule in the context of an enforcement action cannot be sustained by the time limitations found in 33 U.S.C. § 1369(b).

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[58] *See* First Amended Complaint ¶¶ 40-41.

[59] 131 S. Ct. 871, 882, 178 L. Ed. 2d 716 (2011), *citing Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911, 137 L. Ed. 2d 79 (1997).

C. The Decision Below Would Result In Regulatory Uncertainty If Upheld.

As a party that regularly comments on all agency rules, programmatic plans and projects that affect the forest and early successional habitat favored by ruffed grouse and American woodcock, the decision below is of great concern. The Society participates at the early stages of the administrative process, in part, because of the finality of the process. By allowing a regulation to be subjected to judicial review at any point in the future under the guise of ambiguity results in a waste of administrative resources[60] and puts any and every regulation in limbo awaiting a clever litigation strategy.[61] In addition, by allowing parties to challenge agency regulations through a citizen enforcement action to which the governmental agency is not even a party, the parties are able to circumvent the will of Congress in bypassing the original jurisdiction of the Courts of Appeal.

The decision will result in administrative gridlock of a magnitude never seen before. The court of appeals' decision cannot be reasonably limited to

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[60] Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 Cardozo L. Rev. 2203, 2204 (2011) ("A core idea behind these provisions is that rules adopted in these regulatory areas can entail enormous up-front investments of money, effort, and advance planning.").

[61] For example, in this case the respondents transformed an unripe citizen enforcement action into a vehicle for challenging agency regulations based only upon a subsequent *amicus* brief filed by a non-party.

apply to only logging roads covered by the Silvicultural Rule. Its rationale will apply equally to all forest roads, whether used for logging or not. All roads that are served by ditches and culverts and eventually discharge into natural surfaces waters would be swept up in its regulatory net. Contrary to the court's assumptions of fact, many forest roads, including the roads at issue in this case, are not dedicated to logging. This would burden all private forest landowners and all who rely upon these roads for recreational and hunting access.

If this Court does not reverse the decision below, one commentator has suggested that it could call into doubt countless other Clean Water Act exemptions, such as those found within the agricultural industry for concentrated animal feeding operations under 33 U.S.C. § 1362(14) and agricultural return flows under 33 U.S.C. § 1342(l)(1) or stormwater runoff from oil, gas and mining operations under 1342(l)(2).[62] More importantly, the rulemaking process will lose any meaning to stakeholders like the Society as certainty is removed from the process.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the

[62] Mark A. Ryan, *Ninth Circuit Upends the CWA Applecart*, Nat. Resources & Env't, Winter 2011 at 51.

Ninth Circuit with instructions that the action be dismissed as time-barred under 33 U.S.C. § 1369(b)(1).

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RECORD
AND
BRIEFS

Nos. 11-338, 11-347

IN THE
Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, *et al.*, *Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*, *Respondents*.

GEORGIA-PACIFIC WEST, INC., *et al.*, *Petitioners*,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE SOCIETY OF AMERICAN FORESTERS; NATIONAL ASSOCIATION OF STATE FORESTERS; ASSOCIATION OF CONSULTING FORESTERS OF AMERICA, INC.; NATIONAL ASSOCIATION OF FOREST SERVICE RETIREES; FORESTRY SCHOOLS; AND ACADEMICS AND FORESTRY PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

This case concerns environmental impacts associated with stormwater runoff from forest roads and particularly the use of best management practices ("BMPs") to control such impacts. *Amici* are forestry professionals, schools, academics, and scientists whose professional work focuses on forestry management and who are interested in the development and effectiveness of BMPs.[1]

The Society of American Foresters ("SAF") is the national scientific and educational organization that represents the forestry profession. SAF's 12,000 members are dedicated to the use of the knowledge, skills, and conservation ethic of the profession to ensure the continued health and use of forest ecosystems and the present and future availability of forest resources to benefit society.

The National Association of State Foresters ("NASF") is a non-profit organization that represents the directors of forestry agencies from the fifty States, eight U.S. Territories and associated States, and the District of Columbia. States have leading roles in controlling water quality impairments associated with nonpoint source pollution. State Foresters have the primary responsibility for administering forestry BMP programs designed to address nonpoint

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. The letters of consent have been filed with the Court.

source pollution from forestry activities under the Clean Water Act.

The Association of Consulting Foresters of America, Inc. ("ACF") has been dedicated to the needs and interests of consulting foresters since 1948 and has 650 members in 35 States. Consulting foresters are professional foresters who perform technical forestry work but do not work for a single full-time employer, instead offering their services on a fee or contract basis to the general public. ACF membership is prestigious. Members are required to have a Bachelor of Science degree in Forestry or Natural Resources from an approved college, as well as landowner and personal references, and must pursue continuing forestry education. A member's principal business activity must be forestry consulting, and candidates must not have an economic interest in a timber procurement entity.

The National Association of Forest Service Retirees ("NAFSR") is a national scientific and educational association whose members believe in the U.S. Forest Service and its mission. NAFSR members have dedicated their careers to the protection, development, and management of our Nation's National Forests and National Grasslands, as well as cooperation and information-sharing on these matters in the United States and around the world.

The State University of New York ("SUNY") College of Environmental Science and Forestry ("ESF") is the oldest and largest college in the United States that focuses exclusively on the natural environment. ESF has been a leader in environmental education since 1911. The college offers hundreds of courses in nine program areas and degrees ranging from the associate's degree in forest technology to the

doctor of philosophy. The main campus in Syracuse is supplemented by 25,000 acres of field stations across New York State and in Costa Rica.

Auburn University's School of Forestry & Wildlife Sciences is home to the State of Alabama's oldest and largest forestry program and has been continuously accredited by SAF since 1950. The School offers undergraduate and graduate programs in natural resources and has a comprehensive research program that includes environmental assessments of forest management practices.

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SUMMARY OF ARGUMENT

The construction and maintenance of forest roads is an essential aspect of forest management. Forest roads not only provide access for timber harvesting but also are used for reforestation, fire control, wildlife habitat and stream improvement projects, and recreation. Since the inception of the Clean Water Act ("CWA" or "Act"), the U.S. Environmental Protection Agency ("EPA") has treated stormwater runoff associated with forest roads as "nonpoint source" flow that is properly managed at the state and local level through the use of BMPs.

Based on *Amici*'s experience and research, EPA's approach is sound. As reflected in the scientific literature, and confirmed by practical experience, BMPs are an effective and efficient approach to manage stormwater runoff in areas where silvicultural activities have occurred, including runoff from forest roads, ditches, and culverts.

State forestry BMP programs are widespread and robust. From the flat terrains of the South's Lower Coastal Plain to the steep inclines of the Pacific Northwest, forests differ substantially from one State to the next, and even within a State. States—with the support of professional forestry organizations—

have expended substantial resources to develop BMP programs that are tailored to the specific geographic, climatic, and topographic conditions within each State. As numerous studies demonstrate, these BMP programs are achieving their purpose—effective and efficient environmental protection—and continue to improve as States and forest professionals, including *Amici*, monitor and revise BMPs to address local environmental challenges.

The results demonstrate the wisdom of Congress's choice when it passed the CWA to mobilize all levels of government, employing all their complementary authorities, in the service of the CWA's ambitious water quality goals. This Court should reject the Ninth Circuit's decision to cast aside almost 40 years of successful environmental management in favor of an unworkable end-of-pipe permitting scheme ill-suited to diffuse stormwater runoff and contrary to Congress's intent, EPA's expert judgment, and sound forest science.

ARGUMENT

I. For Almost 40 Years, EPA Has Treated Forest Road Runoff as a Nonpoint Source To Be Managed Through BMPs Administered by States.

The CWA established a multi-faceted regulatory approach for restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. Grounded in cooperative federalism, the Act is a comprehensive statute that partners all levels of government to protect water quality.

On the one hand, Congress created a federal permitting program to manage end-of-pipe discharges from "point source[s]" (defined generally as "any discernible, confined and discrete conveyance"). CWA § 502(14), 33 U.S.C. § 1362(14). That National Pollutant Discharge Elimination System ("NPDES") program requires permits with precise effluent limitations for the discharge of pollutants into navigable waters of the United States from point sources. CWA § 402, 33 U.S.C. § 1342.

On the other hand, Congress knew that some sources of water pollution did not come out of the ends of pipes and recognized that traditional state authority over land and water resources could be effective in addressing those nonpoint sources. Thus, the Act "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b), 33 U.S.C. § 1251(b). And it deploys traditional state authorities to address the more diffuse sources of nonpoint pollution. In pursuit of the CWA's ambitious water quality goals, and using the cooperative federalism partnership established by the CWA, States have established water quality standards and have developed areawide treatment plans and management programs that address nonpoint source pollution. CWA §§ 208, 303 & 319, 33 U.S.C. §§ 1288, 1313 & 1329.

Although the CWA contains a general definition of "point source," Congress intended for EPA to issue "[g]uidance with respect to the identification of 'point sources' and 'nonpoint sources.'" 117 CONG. REC. 38,816 (1971). In particular, EPA was given the task

of defining the contours of "nonpoint sources of pollutants," such as "agricultural and silvicultural activities, including runoff from fields and crop and forest lands." CWA § 304(f), 33 U.S.C. § 1314(f).

Acting pursuant to Congress's direction, EPA has—for almost 40 years—taken the position that runoff from forest roads, including runoff that has been diverted to ditches and other artificial conveyances, is a nonpoint source flow. *See, e.g.*, 41 Fed. Reg. 24,709, 24,710 (June 18, 1976) ("Silvicultural Rule") (now codified at 40 C.F.R. § 122.27); *see also* 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976) (proposed Silvicultural Rule); 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990) (stating EPA's intention to exclude nonpoint source silvicultural discharges from the NPDES stormwater permitting program under CWA § 402(p), 33 U.S.C. § 1342(p)). As EPA noted in 1975, "most rainfall runoff is more properly regulated under [CWA] section 208[2] . . . , whether or not the rainfall happens to collect before flowing into navigable waters," including "silvicultural runoff, . . . [which] frequently flows into ditches." 40 Fed. Reg. 56,932, 56,932 (Dec. 5, 1975). Thus, the Silvicultural Rule adopted in 1976 specifically excluded from NPDES permitting "nonpoint source activities inherent to silviculture such as . . . surface drainage[] and road construction and maintenance from which runoff results from precipitation events." 41 Fed. Reg. at 24,712.

As EPA has recognized from the beginning of the program, NPDES permitting was not designed for—and does not fit—the type of pollution created by forest road runoff. The NPDES program is designed

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[2] Section 208, 33 U.S.C. § 1288, sets forth the parameters for state-led areawide waste management treatment programs.

to control and eliminate discharges from discrete conveyances that are under the control of a single operator who can be held liable for the material discharged through the pipe. In contrast, the pollutants associated with forest road runoff "are induced by natural processes, including precipitation . . . and runoff," and "[t]he pollutants discharged are not traceable to any discrete or identifiable facility." *Id.* at 24,710. Accordingly, EPA determined that forest road runoff is "better controlled through the utilization of best management practices." *Id.*

For the reasons stated by Petitioners, it was well within EPA's authority to treat forest road runoff, including runoff in drainage ditches that are inherent to road construction and maintenance, as a nonpoint source discharge. Furthermore, as discussed by *Amici* in this brief, the on-the-ground results have borne out the wisdom of EPA's judgment. Through their nonpoint source CWA authority and their traditional authorities over land and water resources, States have widely implemented BMPs across the country. As numerous studies demonstrate, these BMPs are effective in mitigating environmental impacts from stormwater runoff associated with silvicultural activities.[3] In holding that channelized stormwater runoff from forest roads is subject to NPDES permit requirements, the Ninth Circuit has

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[3] *See, e.g.*, Warren E. Archey, National Association of State Foresters, 2004 PROGRESS REPORT: STATE WATER RESOURCES PROGRAMS FOR SILVICULTURE iv (2004) (hereinafter NASF, 2004 PROGRESS REPORT); George Ice et al., *Programs Assessing Implementation and Effectiveness of State Forest Practice Rules and BMPs in the West*, 4 WATER AIR & SOIL POLLUTION 143, 161 (2004).

discredited nearly 40 years of state leadership in the effective development of forestry BMPs.

II. BMPs Are an Environmentally Sound and Efficient Approach for Controlling Stormwater Impacts from Silvicultural Activities, Including Forest Roads.

As defined in the *Dictionary of Forestry*, "silviculture" is "the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis."[4] Silviculture includes activities such as timber harvesting, reforestation, and the construction, use, and maintenance of forest roads.

Modern silvicultural science recognizes that these activities may have environmental impacts of differing nature and extent based on climate, topography, and the particular stage of a given silvicultural activity. Accordingly, state forestry agencies have worked with firms engaged in silvicultural activities, academics, regulatory administrators, and other forest professionals to develop BMPs that avoid and mitigate these impacts. These BMPs are widely implemented and highly effective, and are subject to continual refinement and improvement. In short, the use of forestry BMPs is an environmental success story that should not be brought to a premature end.

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[4] Society of American Foresters ("SAF"), DICTIONARY OF FORESTRY (2008), *available at* http://www.dictionaryofforestry.org/.

A. Environmental Impacts Associated with Silvicultural Activities

Properly undertaken, silviculture is a relatively benign land use with respect to its effects on water resources.[5] A principal environmental concern associated with runoff from silvicultural activities is sedimentation.[6] As defined by EPA, "[s]ediment is the solid material that is eroded from the land surface by water, ice, wind, or other processes and then transported or deposited away from its original location."[7] The source of sediment can vary based on topography (slope and surface roughness), precipitation type and intensity, and soil type.[8] In flatter areas, sediment can travel through erosion of the land surface, while in steeper areas it can also be dislodged through "mass wasting" (e.g., landslides).[9]

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[5] Dan Binkley & Thomas C. Brown, *Forest Practices as Nonpoint Sources of Pollution in North America*, 29 WATER RES. BULL. 729, 736, 738 (1993).

[6] *See* National Council for Air and Stream Improvement ("NCASI"), Special Report No. 12-01, ASSESSING THE EFFECTIVENESS OF CONTEMPORARY FORESTRY BEST MANAGEMENT PRACTICES (BMPS): FOCUS ON ROADS 1 (2012); NCASI Forest Watershed Task Group, FOREST ROADS AND AQUATIC ECOSYSTEMS: A REVIEW OF CAUSES, EFFECTS, AND MANAGEMENT PRACTICES 23 (2003) (hereinafter NCASI 2003 REPORT).

[7] EPA, EPA-841-B-05-0001, NATIONAL MANAGEMENT MEASURES TO CONTROL NONPOINT SOURCE POLLUTION FROM FORESTRY, Ch. 2 at 9 (2005) (hereinafter EPA GUIDANCE).

[8] NCASI 2012 REPORT, *supra* note 6, at 17.

[9] EPA GUIDANCE, *supra* note 7, Ch. 2 at 9.

Sediment delivery through natural processes, and in some instances human-induced disturbances (e.g., landslides), is the principal method by which gravel substrates that are important to salmon spawns enter streams in the Northwest. But sediment delivery to streams can also cause stream turbidity (which is the cloudiness in water caused by suspended particles) and sediment deposition (which causes accumulation of larger particles within channels).[10] If BMPs are not properly implemented, silvicultural activities can cause other impacts on the aquatic environment, including changes in a forest's hydrologic processes through alteration of water flow,

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[10] These two impacts of sedimentation affect aquatic biota differently. Turbidity has been shown in controlled experiments to alter feeding efficiency and growth. John A. Sweka & Kyle J. Hartman, *Effects of Turbidity on Prey Consumption and Growth in Brook Trout and Implications for Bioenergetics Modeling*, 58 CAN. J. FISHERIES & AQUATIC SCI. 386, 392 (2001). In natural conditions, however, trout were able to feed when turbidity limited visibility. Jason L. White & Bret C. Harvey, *Winter Feeding Success of Stream Trout Under Different Streamflow and Turbidity Conditions*, 136 TRANSACTIONS AM. FISHERIES SOC'Y 1187, 1191 (2007). Excess sediment deposition can inhibit fish larvae from emerging from eggs and limit habitat by filling pools. Thomas S. Fudge et al., *Effect of Different Levels of Fine-Sediment Loading on the Escapement Success of Rainbow Trout Fry from Artificial Redds*, 28 N. AM. J. FISHERIES MGMT. 758, 758 (2008); Thomas E. Lisle & Sue Hilton, *Fine Bed Material in Pools of Natural Gravel Bed Channels*, 35 WATER RES. RESEARCH 1291, 1302 (1999).

channel encroachment,[11] and prevention of fish passage through culverts.[12]

The environmental effects of silvicultural activities on water quality are relatively minimal compared to other land uses.[13] Although forests occupy about one-third of the land base in the United States, silvicultural impacts are associated with fewer than five percent of impaired rivers and streams nationwide.[14] In 30 of the 45 States that have reported information to EPA about probable sources of water quality impairment, silviculture is not considered a probable source for *any* impairments. Indeed, silvicultural impacts on water resources are substantially less significant than impacts from wildlife and other natural causes.

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[11] Channel encroachment is a relic of past practices. "State regulations and forestry BMPs no longer allow road[]" construction "directly adjacent to and within stream channels." NCASI 2003 REPORT, *supra* note 6, at 22.

[12] *Id.* at 7-8.

[13] Dan Binkley & Thomas C. Brown, U.S. Department of Agriculture ("USDA"), Forest Service, General Technical Report RM-239, MANAGEMENT IMPACTS ON WATER QUALITY OF FORESTS AND RANGELANDS 5 (1993).

[14] Data on impaired rivers and streams cited herein were acquired from EPA's Watershed Assessment, Tracking, and Environmental Results (WATERS) website and validated using web reports generated using the National Summary of Assessed Waters Report (http://www.epa.gov/waters/ir/) in the Assessment, TMDL Tracking and Implementation System (ATTAINS) integrated reporting database.

B. Addressing Silvicultural Impacts Through BMPs

Stormwater runoff from forest roads and other silvicultural activities is different in kind from the pollution that is typically addressed through the CWA Section 402 NPDES permitting program.[15] The typical NPDES permittee is a sewage treatment plant or an industrial plant that discharges its wastewater through outfall pipes to a nearby waterbody. NPDES permits control the composition of the wastewater and require treatment at the point of discharge and monitoring of the final effluent to meet specified permit limits.[16]

Stormwater runoff, by contrast, runs across a landscape and generally covers a large area of land and many miles of roads owned and used by many different persons for a variety of activities.[17] Thus, there is no distinct source of sediment, and no single landowner or forest manager is in a position to control what happens to the water or to operate a treatment process prior to the stormwater entering a stream.

Moreover, "pollutants" (including sediment) associated with silvicultural activities are derived from the natural environment and at certain levels can be

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[15] *Cf.* George Ice, *History of Innovative Best Management Practice Development and Its Role in Addressing Water Quality Limited Waterbodies*, 130 J. ENVTL. ENGINEERING 684, 685 (2004) (hereinafter Ice, *History of BMPs*) (comparing characteristics of point sources and nonpoint sources of pollution).

[16] 41 Fed. Reg. at 24,710 ("[P]oint sources of water pollution are generally characterized by discrete and confined conveyances from which discharges of pollutants into navigable waters can be controlled by effluent limitations.").

[17] 77 Fed. Reg. 30,473, 30,475 (May 23, 2012).

beneficial to the ecosystem.[18] The pollutant load (i.e., the amount of pollutants carried by the water) is generally low, is difficult to monitor, and varies over time depending on the stage and nature of the silvicultural activity.[19] Water quality effects are usually greatest in the first two to three years of silvicultural activity and "almost universally diminish" thereafter.[20] Finally, it is "difficult to establish representative monitoring" conditions because weather and hydrology (water flow patterns) affect pollutant levels in unpredictable ways.[21] For all these reasons, as Congress and EPA have long recognized, silvicultural activities do not pose the type of end-of-pipe problem that is conducive to an NPDES permitting solution.

Instead, States rely on BMPs as the "building blocks"[22] of their forestry nonpoint source management programs.[23] A BMP is "a practice or usually a combination of practices that are determined by a state or a designated planning agency to be the most

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[18] Ice, *History of BMPs*, *supra* note 15, at 685.

[19] *Id.*

[20] Christopher J. Anderson & B. Graeme Lockaby, *The Effectiveness of Forestry Best Management Practices for Sediment Control in the Southeastern United States: A Literature Review*, 35 S.J. APPLIED FORESTRY 170, 173 (2011).

[21] Ice, *History of BMPs*, *supra* note 15, at 685; *see also* George G. Ice & Stephen H. Schoenholtz, *Understanding How Extremes Influence Water Quality: Experience from Forest Watersheds*, 19 HYDROLOGICAL SCI. TECH. 99, 104 (2003) (explaining effects of major extreme events such as fire and flood).

[22] EPA GUIDANCE, *supra* note 7, Ch. 2 at 17.

[23] NCASI, Technical Bull. No. 966, COMPENDIUM OF FORESTRY BEST MANAGEMENT PRACTICES FOR CONTROLLING NONPOINT SOURCE POLLUTION IN NORTH AMERICA 1 (2009) (hereinafter NCASI COMPENDIUM).

effective and practicable means (including technological, economical, and institutional considerations) of controlling point and nonpoint source pollutants at levels compatible with environmental quality goals."[24] The development of BMPs is a multi-step process that is based on unifying scientific principles.[25] A problem is identified, potential solutions are identified and analyzed, specific management practices are developed, testing is conducted to determine effectiveness, and practices are refined and adapted as needed.[26] This process is continually repeated, ensuring that BMPs address the latest issues with the best and most up-to-date science.

BMPs have been developed for virtually all stages and aspects of silviculture: preharvest planning, streamside management areas, road construction/reconstruction, road management, timber harvesting, site preparation and forest regeneration, fire management, revegetation of disturbed areas, forest chemical management, and wetland forest management.[27] Within each of these BMP categories, there are numerous specific BMPs.[28] Some BMPs are

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[24] SAF, DICTIONARY OF FORESTRY, *supra* note 4.

[25] *See* NCASI COMPENDIUM, *supra* note 23, at President's note. Core BMP themes include: "1) minimizing soil compaction and the extent of bare soils; 2) separating exposed soils from surface waters; 3) separating fertilizer and herbicide applications from surface waters; 4) inhibiting hydraulic connections between bare ground and surface waters; 5) providing forested buffers around watercourses; and 6) designing stable roads and watercourse crossings." *Id.* at 194 (internal citation omitted).

[26] Ice, *History of BMPs*, *supra* note 15, at 685-86.

[27] EPA GUIDANCE, *supra* note 7, Ch. 3 at 1.

[28] *Id.*

structural (e.g., installation of drainage ditches and coverage of the road surface with gravel or mulch), and others are operational (e.g., restrictions on road use or other activities during storm events and maintenance of a minimum buffer width between ongoing silvicultural activities and neighboring streams).[29] These requirements are often highly specific to a given location. For example, Oregon's BMPs require certain numbers, types, and sizes of trees in streamside management areas.[30]

In the Pacific Northwest—which has large forest resources supporting extensive silvicultural activity—BMPs are incorporated into each State's Forest Practices Act and implementing regulations.[31] In many States, BMPs are set out in a BMP guidance manual that provides landowners and loggers with a menu of options from which to tailor environmental protection measures at each site. State BMP guidance is extensive. For example, Florida's BMP manual spans 116 pages;[32] Texas's forestry and forest wet-

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[29] *Id.*, Ch. 2 at 17.

[30] George G. Ice et al., *Trends for Forestry Best Management Practices Implementation*, 108 J. FORESTRY 267, 268 (2010) (hereinafter Ice et al., *Trends*).

[31] Council of Western State Foresters, FORESTRY BEST MANAGEMENT PRACTICES FOR WESTERN STATES: A SUMMARY OF APPROACHES TO WATER QUALITY IMPLEMENTATION AND EFFECTIVENESS MONITORING 5, 10, 13 (2007); *see also, e.g.*, California Department of Forestry and Fire Protection Resource Management, Forest Practice Program, CALIFORNIA FOREST PRACTICE RULES (2012); Paul W. Adams, *Oregon's Forest Practice Rules*, THE WOODLAND WORKBOOK (Oregon State University Extension Service, 1996).

[32] Florida Division of Agriculture & Consumer Services Technical Advisory Committee, SILVICULTURE BEST MANAGEMENT PRACTICES (2011).

land guidelines and recommendation specifications are over 100 pages;[33] and Minnesota's management guidelines are hundreds of pages in length (including 49 pages on forest roads).[34]

There are a number of BMPs specifically targeted to control sedimentation from forest road runoff. Under modern BMPs, a well-designed forest road is not simply a flat surface. Rather, a forest road is designed in light of local conditions, including the slope on which it sits, which in turn dictates the type of road drainage structures that will be needed, including, as appropriate, culverts, ditches, waterbars,[35] dips, and other drainage structures to manage and control rainfall flows. As shown in Figure 1, the "road prism" is "comprised of the road cutslope, the road tread, the road fillslope, and any additional widening for ditches, berms [i.e., raised barriers], or other disturbed surfaces that are structural parts of the road right-of-way."[36]

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[33] Texas Forest Service & Texas Forestry Association, TEXAS FORESTRY BEST MANAGEMENT PRACTICES (2010) (hereinafter TEXAS BMP MANUAL).

[34] Minnesota Forest Resources Council, SUSTAINING MINNESOTA FOREST RESOURCES: VOLUNTARY SITE-LEVEL FOREST MANAGEMENT GUIDELINES FOR LANDOWNERS, LOGGERS AND RESOURCE MANAGERS (2005, 2007 update).

[35] Waterbars are "speed bumps" for water that interrupt stormwater flow to limit the distance and speed that water flows along the surface of the road.

[36] NCASI 2003 REPORT, *supra* note 6, at 2.

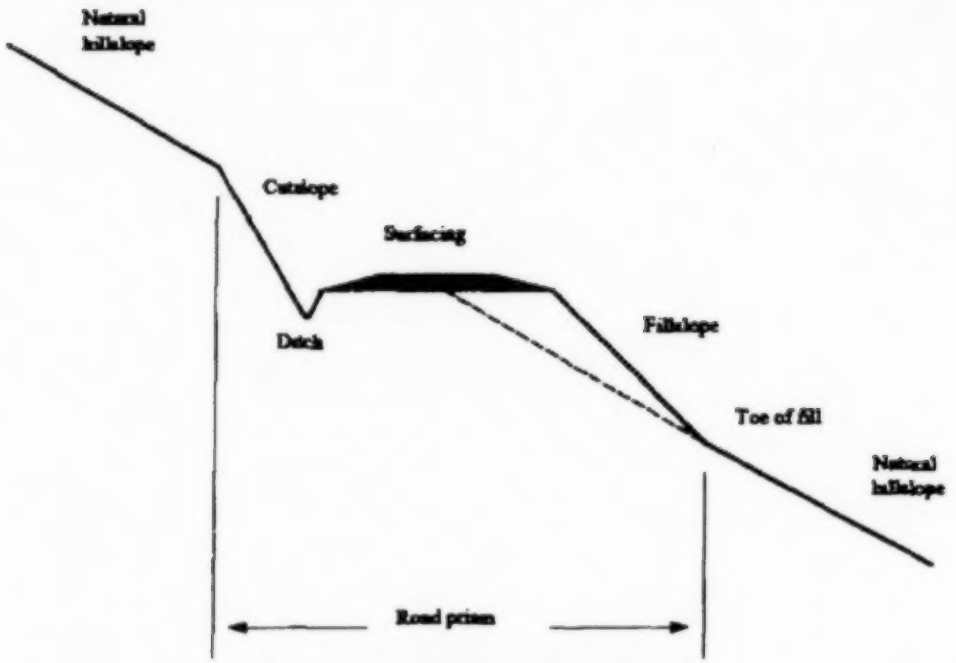

Figure 1. Road Prism Structural Features

Source: NCASI 2003 REPORT, *supra* note 6, at 2 (adapted from Oregon Department of Forestry, FOREST ROAD MANAGEMENT GUIDEBOOK: MAINTENANCE AND REPAIRS TO PROTECT FISH HABITAT AND WATER QUALITY (2000)).[37]

Many forest road BMPs focus on controlling runoff and dispersing water across the forest floor in order to avoid concentrated flows into neighboring streams. For example, Texas mandates that "[r]oad gradients . . . should be changed to disperse surface water at least 50 feet from the *stream*" and also prescribes spacing distances between waterbars based on the grade of the road.[38]

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[37] This figure illustrates a cross-section of a forest road in the steep terrain of Oregon.

[38] TEXAS BMP MANUAL, *supra* note 33, at 31, 36 (emphasis in original).

As these examples illustrate, BMPs are carefully designed to mitigate the environmental impacts associated with silvicultural activities, including forest road runoff. As discussed below, BMPs are tailored to the individual States—and even to local conditions within the States—and are being implemented at very high rates throughout the country.

C. Implementation at the State Level

BMPs are effective and efficient because they are tailored to local conditions in individual States. A host of local conditions influence the choice of BMPs, including: forest conditions (e.g., size, type, and harvesting and regeneration methods); topography; soil erodibility and infiltration characteristics; precipitation amount, intensity, and form (e.g., snow); and forest ownership (i.e., industrial, private, state government, or federal government).

For example, BMPs applicable to the steep terrain and high rainfall areas of the Coast Range in parts of Oregon would impose an unnecessary expense in a State like Florida—where forest roads are generally constructed on relatively flat terrain with sandy, well-drained soils—or even in other flatter, more arid areas of Oregon. And in the flat terrain of a North Carolina wet pine forest, installation of a continuous berm along the side of a road can be highly effective in minimizing accumulation of sediment in roadside ditches, while erosion could actually be exacerbated if a berm were constructed in the steeper inclines of North Carolina's Piedmont.[39] Because of States'

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[39] NCASI, Comments on 77 Fed. Reg. 30,473 (May 23, 2012), Docket ID No. EPA-HQ-OW-2012-0195-0103 (June 21, 2012), at 9.

familiarity with their own terrain, they can account for these critical differences in designing BMPs.

State BMP programs rely on a variety of tools to promote BMP implementation, including: regulatory requirements; education and training; demonstration projects; research on BMP effectiveness; and monitoring of BMP use. In some States, forest landowners must notify the State prior to road construction and comply with an approved road construction plan. Many other States have established training and incentive programs for landowners and loggers to promote the use of forestry BMPs where their use is recommended but not required.[40]

State BMP programs are supplemented and reinforced by certification programs, including the Sustainable Forestry Initiative ("SFI"), the Forest Stewardship Council, and the American Tree Farm System.[41] Participation in these certification programs—undertaken by a majority of large forest products and landholding firms in the United States—requires implementation of BMPs.[42] In addi-

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[40] *E.g.*, NCASI COMPENDIUM, *supra* note 23, at 55 (Colorado).

[41] *E.g.*, Hughes Simpson et al., Texas Forest Service, VOLUNTARY IMPLEMENTATION OF FORESTRY BEST MANAGEMENT PRACTICES IN EAST TEXAS: RESULTS FROM ROUND 7 OF BMP IMPLEMENTATION MONITORING 2007-2008, at 32 (2008); Arkansas Forestry Commission, FORESTRY BEST MANAGEMENT PRACTICES FOR WATER QUALITY PROTECTION IN ARKANSAS IMPLEMENTATION REPORT 26 (2005); Maine Department of Conservation & Maine Forest Service, MAINE FORESTRY BEST MANAGEMENT PRACTICES USE AND EFFECTIVENESS—2005-2009, at 1 (2010) (hereinafter MAINE BMP STUDY).

[42] *See, e.g.*, SFI, 2010-2014 Standard (2010), *available at* http://www.sfiprogram.org/files/pdf/Section2_sfi_requirements_2010-2014.pdf (Objective 3: requiring compliance with applicable laws, including those related to BMPs, on SFI-certified forest

tion, standard commercial contracts between companies that procure large amounts of wood and market participants upstream in the wood supply chain (including loggers and haulers) require use of BMPs and provide that payment may be reduced or withheld if BMPs are not followed.

The various approaches for promoting the use of forestry BMPs are working. Implementation rates have increased significantly over the past 20 years. In Montana, for example, the BMP implementation rate rose from 78 percent in 1990 to 97 percent in 2010.[43] In Florida, the implementation rate rose from under 85 percent in 1985 to 98.7 percent in 2011.[44] Today, the BMP implementation rate across States is high. For example, a recent nationwide evaluation estimated overall forestry BMP implementation at 89 percent.[45] Over 81 percent of the Nation's timber harvest comes from 16 States, which have an implementation rate over 90 percent.[46] The fact that States with the highest timber production also tend to have the highest implementation rates demonstrates that

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lands; Objective 10: requiring SFI-certified companies to mandate the use of sustainable forestry practices and monitor BMP conformance).

[43] Montana Department of Natural Resources & Conservation, Forestry Division, MONTANA FORESTRY BEST MANAGEMENT PRACTICES MONITORING: 2010 FORESTRY BEST MANAGEMENT PRACTICES FIELD REVIEW RESULTS 2 (2010); *see also* Brian D. Sugden et al., *Montana's Forestry Best Management Practices Program: 20 Years of Continuous Improvement*, 110 J. FORESTRY 328 (2012).

[44] Jeff Vowell et al., Florida Department of Agriculture & Florida Forest Service, SILVICULTURAL BEST MANAGEMENT PRACTICES 2011 IMPLEMENTATION SURVEY REPORT 6 (2012).

[45] Ice et al., *Trends*, *supra* note 30, at 271.

[46] *Id.*

cooperative federalism is working: States with the largest forest resources, and most extensive forest activities, are leaders in BMP implementation.

Results of BMP implementation surveys and other field assessments are helping States to identify and control impacts on water resources from forest roads in particular. In Texas, for example, surveys conducted in the 1990s revealed that BMP implementation rates for temporary roads were substantially lower than the State's average for all BMP categories (e.g., 78 percent vs. 88.6 percent in 1998-1999).[47] In response, the Texas Forest Service and other stakeholders placed greater emphasis on temporary roads in their BMP education and training programs. In the 2010-2011 survey, the BMP implementation rate for temporary roads had increased to 98 percent, and exceeded the average rate of 94.1 percent for all BMP categories.[48]

D. Effectiveness of Forestry BMPs

The potential of forestry BMPs to mitigate environmental impacts was recognized early in their development. In 1979, a study of the Grant Forest Watershed in Georgia predicted that three management changes—(1) better road design, location, and maintenance, (2) wider buffers around streams, and (3) avoidance of machine planting of vegetation in

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[47] Burl Carraway et al., Texas Forest Service, VOLUNTARY COMPLIANCE WITH FORESTRY BEST MANAGEMENT PRACTICES IN EAST TEXAS: RESULTS FROM ROUND 4 OF BMP MONITORING (2000).

[48] Hughes Simpson et al., Texas Forest Service, VOLUNTARY IMPLEMENTATION OF FORESTRY BEST MANAGEMENT PRACTICES IN EAST TEXAS: RESULTS FROM ROUND 8 OF BMP IMPLEMENTATION MONITORING 2010-2011, at 13, 36 (2011).

areas subject to historic disturbances—could reduce sediment movement by a factor of ten.[49] Subsequent studies confirmed that installation of BMPs reduced sediment levels by approximately the same degree that the 1979 study had predicted.[50]

The results of similar paired watershed studies—where modern-era BMPs are compared to historical practices—have demonstrated the effectiveness of BMPs elsewhere in the country. Study of the Alto Watershed in East Texas found that the use of modern BMPs resulted in one-fifth the sediment load observed in the 1980s.[51] A 1998 study of California's Caspar Creek showed a significant reduction in sediment load following imposition of forest practice rules.[52] In a 2009 study of a watershed in Washing-

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[49] *See* John D. Hewlett, FOREST WATER QUALITY: AN EXPERIMENT IN HARVESTING AND REGENERATING PIEDMONT FORESTS 21 (University of Georgia School of Forest Resources Press, 1979).

[50] Noah E. Fraser, *A Paired Watershed Investigation of Clearcut BMPs Revisited: B.F. Grant Memorial Forest, Georgia After the Thirty-Year Growing Cycle*, Master's Thesis, University of Georgia, at 95 (2006); *see also* Thomas M. Williams et al., *Effectiveness of Best Management Practices To Protect Water Quality in South Carolina Piedmont*, PROCEEDINGS OF THE TENTH BIENNIAL SOUTHERN SILVICULTURAL RESEARCH CONFERENCE 276 (1999).

[51] *See, e.g.*, W.H. Blackburn et al., *Stormflow and Sediment Loss from Intensively Managed Forest Watersheds in East Texas*, 26 WATER RES. BULL. 465 (1990) (initial study of Alto Watershed in East Texas); Matthew W. McBroom et al., *Storm Runoff and Sediment Losses from Forest Clearcutting and Stand Re-establishment*, 22 HYDROLOGICAL PROCESSES 1509, 1520 (2008) (follow-up study).

[52] Peter H. Cafferata & Thomas E. Spittler, *Logging Impacts of the 1970's vs. the 1990's in the Caspar Creek Watershed*, in USDA, Forest Service, General Technical Report PSW-GTR-168,

ton State, thirty years of monitoring data show reductions in turbidity over time. The study's authors concluded that "[o]ur results suggest that increased attention to reducing sediment production from roads and minimizing the amount of road runoff reaching stream channels has been the primary cause of the declining turbidity levels observed in this study."[53]

An early study of the Alsea Watershed in Oregon led to Oregon's adoption of the Oregon Forest Practices Act ("OFPA") rules in 1972.[54] The original Alsea Watershed study took place from 1958 to 1973 and monitored the effects of timber harvesting without use of contemporary BMPs on water quality and aquatic habitats, including salmon populations. Needle Branch, an intensively harvested watershed in the Alsea study, was extensively clearcut and subsequently slashed and burned, leaving it with no streamside vegetative buffers.[55] With the imple-

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PROCEEDINGS OF THE CONFERENCE ON COASTAL WATERSHEDS: THE CASPAR CREEK STORY 113 (1998).

[53] Maryanne Reiter et al., *Temporal and Spatial Turbidity Patterns Over 30 Years in a Managed Forest of Western Washington*, 45 J. AM. WATER RES. ASS'N 793, 793 (2009).

[54] Ice, *History of BMPs*, *supra* note 15, at 686.

[55] George G. Ice et al., *Forest Management To Meet Water Quality and Fisheries Objectives: Watershed Studies and Assessment Tools in the Pacific Northwest*, in George G. Ice & John D. Stednick, eds., A CENTURY OF FOREST AND WILDLAND WATERSHED LESSONS 240 (2004). Modern-day OFPA rules require buffers around fish-bearing streams, additional protection around non-fish-bearing streams, rules to keep fresh slash (e.g., harvest debris) out of state jurisdictional waters, rules on maximum clearcut size, "green-up" reforestation requirements between harvests, and other BMPs, including for roads.

mentation of contemporary forestry BMPs, Needle Branch has experienced some of the most dramatic reductions in stream impacts that have ever been achieved with modern BMPs.[56]

Studies focused on specific BMP types—including BMPs for forest roads—have confirmed the effectiveness of BMPs at a micro level. One study in Georgia showed that reconstruction of forest roads with BMPs lowered the sediment yield, as compared to pre-BMP roads, by 70 percent.[57] In Oklahoma, installation of BMPs on unpaved rural roads, which are similar in character to forest roads, reduced the sediment load by up to 80 percent.[58]

Road segment BMP studies have focused on everything from how different road shapes and surfaces affect erodibility and traffic impacts[59] to how seeding,

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[56] *See* Ice, *History of BMPs*, *supra* note 15, at 687.

[57] Mark S. Riedel & James M. Vose, *Collaborative Research and Watershed Management for Optimization of Forest Road Best Management Practices*, INTERNATIONAL CONFERENCE OF ECOLOGY AND TRANSPORTATION PROCEEDINGS 148, 148, 156 (Federal Highway Administration, 2003).

[58] Donald J. Turton et al., *Effectiveness of BMPs in Reducing Sediment from Unpaved Roads in the Stillwater Creek, Oklahoma Watershed*, 45 J. AM. WATER RES. ASS'N 1343, 1343-44 (2009).

[59] Elizabeth M. Toman & Arne E. Skaugset, *Designing Forest Roads To Minimize Turbid Runoff During Wet Weather Use*, PROCEEDINGS OF THE FOURTH CONFERENCE ON WATERSHED MANAGEMENT TO MEET WATER QUALITY STANDARDS AND TMDLS (Am. Soc'y of Agric. & Biological Eng'rs, 2007); Drew B.R. Coe, *Sediment Production and Delivery from Forest Roads in the Sierra Nevada, California*, Master's Thesis, Colorado State University (2006); L.W. Swift, Jr., *Gravel and Grass Surfacing Reduces Soil Loss from Mountain Roads*, 30 FOREST SCI. 657 (1984).

mulching, and application of slash affect erosion from the road prism's surface and cut-and-fill slopes.[60] These studies demonstrate that just a single improved management practice can result in a significant reduction in a road's environmental impacts. For example, one study found that including a continuous berm at a road's edge could lead to a 99 percent reduction in sediment loss.[61]

Focused studies of forestry practices have enabled States and forest managers to target problems and engage in adaptive management. For example, sidecast roads—roads constructed on a steep incline and stabilized by the addition of loosely compacted material at the downhill edge of a road prism—were common practice in the 1970s. Studies showed, however, that sidecast roads in the Pacific Northwest contributed to landslides during intense storms because the loosely compacted material was prone to washout.[62] In response, States amended their BMPs

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[60] Walter F. Megahan, *Erosion Processes on Steep Granitic Road Fills in Central Idaho*, 42 SOIL SCI. SOC'Y AM. J. 350 (1978); Dale J. McGreer, *A Study of Erosion from Skid Trails in Northern Idaho*, in NCASI, Technical Bulletin No. 353, MEASURING AND ASSESSING THE EFFECTIVENESS OF ALTERNATE FOREST MANAGEMENT PRACTICES ON WATER QUALITY 1 (1981); C.R. Wade et al., *Comparison of Five Erosion Control Techniques for Bladed Skid Trails in Virginia*, S.J. APPLIED FORESTRY (in press).

[61] T.W. Appelboom et al., *Management Practice for Sediment Reduction from Forest Roads in the Coastal Plain*, 45 TRANSACTIONS AM. SOC'Y AGRIC. ENG'RS 337, 343 (2002).

[62] NCASI, Technical Bulletin No. 456, CATALOG OF LANDSLIDE INVENTORIES FOR THE NORTHWEST 30-32 (1985); *see also* Robert L. Beschta & William L. Jackson, *Forest Practices and Sediment Production in the Alsea Watershed Study*, in J.D. Stednick, ed.,

to prohibit sidecast road construction in areas susceptible to landslides. Subsequent reviews suggest that avoiding construction of sidecast roads has reduced landslide incidents.[63] Furthermore, legacy road conditions, such as sidecast roads constructed in landslide-prone areas, are most effectively addressed as part of ongoing commercial harvesting operations that follow contemporary road BMPs.

E. Continued Enhancement of Forestry BMP Programs

Although BMPs have already been demonstrated to be highly effective in avoiding and mitigating environmental impacts from silvicultural activities, the federal and state governments, as well as organizations and academics such as *Amici*, continue to study and improve forestry BMP programs.

The National Association of State Foresters completed a comprehensive survey of state BMPs in 2004 and is in the process of updating that survey.[64] The Southern Group of State Foresters ("SGSF") and the Northeastern Area Association of State Foresters ("NAASF") have regional monitoring protocols in place to promote consistency in BMP monitoring across States.[65] Moreover, SGSF has peer-reviewed

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HYDROLOGICAL AND BIOLOGICAL RESPONSES TO FOREST PRACTICES: THE ALSEA WATERSHED STUDY 66 (2008).

[63] E. George Robison et al., Oregon Department of Forestry, STORM IMPACTS AND LANDSLIDES OF 1996: FINAL REPORT 10-11 (1999).

[64] NASF, 2004 PROGRESS REPORT, *supra* note 3.

[65] Ice et al., *Trends*, *supra* note 30, at 269; SGSF Water Resources Committee, SILVICULTURAL BEST MANAGEMENT PRACTICES IMPLEMENTATION MONITORING: A FRAMEWORK FOR STATE FORESTRY AGENCIES (2007); Kristina Ferrare et al.,

all BMP programs in its 13 member States at least once in the last five years.[66] The Council of Western State Foresters also has analyzed BMP compliance and effectiveness monitoring.[67]

EPA and other federal agencies support the continual improvement of BMP programs through both technical and financial assistance. In 2005, EPA prepared a comprehensive guidance document entitled *National Management Measures To Control Nonpoint Source Pollution from Forestry*.[68] This more than 200-page document inventoried types of management measures across ten categories in order to "provide technical assistance to state water quality and forestry program managers, nonindustrial private forest owners, industrial forest owners, and others involved with forest management."[69] And the U.S. Department of Agriculture partnered with NAASF to develop its BMP monitoring protocol,[70]

USDA, Forest Service, NA-FR-02-07, BEST MANAGEMENT PRACTICES (BMP) MANUAL—DESK REFERENCE: IMPLEMENTATION AND EFFECTIVENESS FOR PROTECTION OF WATER RESOURCES (2007) (hereinafter NAASF DESK REFERENCE); *see also infra* note 70 & accompanying text.

[66] National Alliance of Forest Owners, Comments on 77 Fed. Reg. 30,473 (May 23, 2012), Docket ID No. EPA-HQ-OW-2012-0195-0134 (June 22, 2012), at 5.

[67] Council of Western State Foresters, *supra* note 31.

[68] EPA GUIDANCE, *supra* note 7.

[69] *Id.*, Ch. 1 at 1.

[70] The protocol software developed is accompanied by two guidance documents. NAASF DESK REFERENCE, *supra* note 65, at 2; David Welsch et al., USDA, Forest Service, NA-FR-02-06, BEST MANAGEMENT PRACTICES (BMP) MONITORING MANUAL—FIELD GUIDE: IMPLEMENTATION AND EFFECTIVENESS FOR PROTECTION OF WATER RESOURCES 2 (2007).

which was funded initially by EPA and the U.S. Forest Service.[71] As additional collaborative studies are conducted, BMPs are continually improved.

CONCLUSION

For the last four decades, EPA has quite sensibly treated forest road runoff as nonpoint source pollution to be controlled at the state level through the use of BMPs. In support of the cooperative federalism framework of the Clean Water Act, States—in partnership with the federal government, private industry, academics and other forestry professionals, and organizations like *Amici*—have responded to EPA's wise policy choice by developing, implementing, studying, and continually refining BMPs. As a result of this longstanding approach, road drainage structures are being disconnected from streams, road and stream crossings are being upgraded, landslides from forest roads are being reduced, BMP education and forest certification programs continually share lessons learned, and the environment is being protected.

In contrast to the proven effectiveness of BMPs, the NPDES permitting system is ill-suited to address the environmental impacts associated with forest road runoff. Unlike the end-of-pipe problem for which NPDES permitting was designed, forest road runoff is generally characterized by contribution from diffuse sources of low loads of natural pollutants, and, as such, it does not fit the NPDES permitting model.

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[71] MAINE BMP STUDY, *supra* note 41, at 3 (explaining development of regional protocol).

Amici respectfully request that the Court allow the States and their partners to continue their effective work of controlling runoff from forest roads through implementation of BMPs and not impose an unnecessary and inefficient permitting system in BMPs' stead.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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September 4, 2012

In The
Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

GEORGIA-PACIFIC WEST LLC, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF ROBERT WAYLAND, MICHAEL COOK, CHUCK FINDLEY, MIKE GEARHEARD, REBECCA HANMER, JAMES HANLON, FRED HANSEN, EPHRAIM KING, MARTHA KIRKPATRICK, RON KREIZENBECK, BILL MATUSZESKI, PHILIP MILLAM, MARTHA PROTHRO, RANDY SMITH, AND CHARLES SUTFIN AS FORMER SENIOR STATE AND FEDERAL ENVIRONMENTAL AGENCY OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici are all former senior officials of the U.S. Environmental Protection Agency (EPA) and/or former state environmental officials with knowledge of (a) water quality problems arising from sediment pollution from logging roads or, (b) efficient and effective approaches to using the permitting mechanisms of the Clean Water Act, including general permits, to address a variety of pollution problems from discharges in circumstances similar to those of logging roads.[1] In their experience, Clean Water Act (CWA) permits have achieved a high degree of compliance with requirements and could reduce logging road pollution in a feasible and effective manner.

Robert Wayland served as the EPA Deputy Assistant Administrator for Water from 1989 to 1991, and EPA's Director of the Office of Wetlands, Oceans, and Watershed from 1991 to 2003. He was a Member of the Virginia State Water Control Board from 2006 to 2011.

Michael Cook served in the EPA from 1991 to 2002 as Director of the Office of Wastewater Management, which was responsible for general and individual permits to control several hundred thousand

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[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *Amici* or their counsel and counsels' employers made a monetary contribution to the preparation or submission of this brief. The parties to the case filed a letter of blanket consent to filing *amicus* briefs and letters are lodged with the Clerk.

municipal and industrial wastewater and stormwater discharges. He has served on the Board of Directors for the Green Infrastructure Center and U.S. Water Alliance since 2007.

Chuck Findley worked for EPA for 30 years. During the last 23 years he held several senior management positions at EPA Region X including Water Permits Section Chief, Water Division Director, Deputy Regional Administrator and Acting Regional Administrator. He represented EPA in developing the interagency Northwest Forest Plan with other federal agencies.

Mike Gearheard was the Region X Water Division Director from 2004 to 2009 and the acting deputy regional administrator until his retirement in July 2009.

James Hanlon was the Director of the Office of Wastewater Management, the senior career executive responsible for the management of the national NPDES permitting program, including stormwater, from 2002 to 2012. Hanlon was Deputy Director of the Office of Science and Technology from 1991 to 2002, the Director of the Municipal Construction Division from 1984 to 1991, and held a variety of staff and management positions in EPA Region 5 from 1972 to 1984.

Fred Hansen was the Deputy Administrator of EPA from October 1994 to September 1998. Prior to serving at EPA, Hansen was the Director of the

Oregon Department of Environmental Quality from February 1984 to October 1994.

Rebecca Hanmer was the Acting Assistant Administrator for Water, Deputy Assistant Administrator for Water, and Director of the Office of Water Enforcement and Permits between 1982 and 1989, and was EPA's liaison with Congress during enactment of the 1987 Water Quality Act. She also directed various EPA regional programs from 1977 to 2007.

Ephraim King was the Branch Chief in EPA's National Pollutant Discharge Elimination System Program from 1987 to 1996 with responsibility for developing and executing EPA's national strategy to implement Phase I stormwater regulations, including authorization of 23 states to issue stormwater permits. King was a Branch Chief and Division Director in EPA's Drinking Water Program from 1996 to 2005. From 2005 to 2011, he was the Director of the Office of Science and Technology which develops water quality standards, EPA recommended criteria, technology-based effluent guidelines, and oversees all state water quality standards programs. King also served as staff attorney for EPA from 1979 to 1987.

Martha Kirkpatrick was an attorney in the EPA Office of Water from 1984 to 1991, serving as a Branch Chief in the Office of Water and Special Assistant to the Deputy Assistant Administrator for Water. She was the Commissioner of the Maine Department of Environmental Protection (DEP) from

1999 to 2003, and served as the DEP's Director of the Bureau of Land and Water Quality from 1991 until 1999.

Ron Kreizenbeck was an EPA employee for over 38 years. Kreizenbeck served as Deputy Regional Administrator for Region X from 2000 to 2008, Director of the Office of Enforcement and Compliance from 1995 to 2000, Director of the Environmental Services Division from 1991 to 1995, and Deputy Director of the Water Division from 1985 to 1991.

Bill Matuszeski was the Director of EPA's Chesapeake Bay Program from 1991 to 2001, and the Associate Assistant Administrator for Water between 1989 to 1991. He is currently on the Boards of the Alliance for the Chesapeake Bay and the Hudson River Foundation.

Philip Millam served as Director of the Office of Water for EPA Region X from 1997 to 1999. He represented EPA on the Forest and Fish negotiations that reached agreement among the state, tribes, and federal agencies regarding forest practices on private land in the State of Washington.

Martha Prothro served in the EPA as Deputy Assistant Administrator for Water from 1991 to 1994, Director of Water Regulations and Standards from 1987 to 1991, and Director of the Permits Division in the Office of Water from 1980 to 1987. From 1995 to 1997, she facilitated EPA's Federal Advisory Committee on Total Maximum Daily Loads, which resulted in

a series of recommendations on implementing water quality standards under the CWA.

Randy Smith was director of the Office of Water in EPA Region X from 1998 to 2004, where he was responsible for Clean Water Act programs in Alaska, Idaho, Oregon, and Washington.

Charles Sutfin was the Director of EPA's Assessment and Watershed Protection Division from 2001 to 2004, the Director of the Water Permits Division from 1999 to 2001, the Director of the Water Division at Region V from 1977 to 1990, the Deputy Director of the Municipal Construction Division from 1975 to 1977, and the Deputy Chief and Chief of the Municipal Technology Branch from 1971 to 1975. He had national responsibility for water permits, watershed planning, non-point source control, water monitoring and assessment, and the development of Total Maximum Daily Loads at various times during his career. At Waste Management Inc., from 1990 to 1997, Sutfin was a corporate Director responsible for environmental compliance of its operations with all international, federal, state and local environmental requirements.

INTRODUCTION

The objective of the Clean Water Act (CWA) is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Achieving that goal, however, is hampered by problems with existing logging activities. As an

EPA-commissioned report has observed, "forestry-related sediment is a leading source of water quality impairment to rivers and streams nationwide." Great Lakes Envtl. Ctr., *National Level Assessment of Water Quality Impairments Related to Forest Roads and Their Prevention by Best Management Practices* [hereinafter *National Level Assessment*] 2 (2008) (citing EPA's 2000 and 2002 National Water Quality Inventories). Almost all of this sediment, in turn, derives from logging roads and stream crossings. *Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency*, 344 F.3d 832, 961 (9th Cir. 2003) (attributing to these sources "up to 90% of the total sediment production from forestry operations"). The sedimentation that arises from these roads is frequently limited to very confined segments, rather than the entire contiguous length of the road. *See* Nathan Nelson, et al., U.S. Forest Service, *Rocky Mountain Research Station, Legacy Roads and Trails Monitoring Project Update 2012* [hereinafter *Legacy Roads and Trails Monitoring Project Update*], at 4 (2012), *available at* <http://www.fs.fed.us/GRAIP/downloads/case_studies/2012LegacyRoadsMonitoringProjectUpdate.pdf> (last visited Oct. 19, 2012) ("Sediment delivery from large studies of forest roads has been found to be localized at a small fraction of the drain points."); *National Level Assessment*, at 14 (describing a study that finding only 0.6% of the length of the roads studied contributed to "events displacing significant quantities [of sedimentation]"). Moreover, these roads are often constructed such that stormwater discharge is channeled from the roads through "systems of ditches, culverts, and

channels," such as the ones at issue here. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1067 (9th Cir. 2011); *see, e.g.*, Virginia Department of Forestry, *Virginia's Forestry Best Management Practices for Water Quality* 23-38 (June 2009), *available at* <www.dof.virginia.gov/wq/resources/FieldBMP/FieldBMP_01_Intro.pdf> (last visited Oct. 19, 2012) (describing general best management practices for the planning and construction of logging roads).

The Clean Water Act provides a powerful tool for addressing this problem: the National Pollutant Discharge Elimination System (NPDES) Program. The NPDES Program is a permitting program for "point source[s]": "any *discernable, confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). Under this program, a point source can be authorized to discharge pollutants into waters of the United States through the grant of an NPDES permit, 33 U.S.C. § 1342; otherwise, such discharges are prohibited, 33 U.S.C. § 1311(a).

This tool lets an administering agency address point-source pollution by allowing it to regulate discharges through either individual permits, *see* 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.55, or general permits to cover entire classes of discharges, 40 C.F.R. § 122.28, 124.19(a). EPA has authorized

forty-six states and the U.S. Virgin Islands to administer programs in satisfaction of the NPDES requirements pursuant to CWA sec. 402(b). 33 U.S.C. § 1342(b). Administering agencies can issue general NPDES permits in order to "greatly reduce [the] administrative burden by authorizing discharges from a category of point sources within a specified geographic area." 40 C.F.R. § 122.28(a)(2). Administering agencies can also issue individual permits that contain technology-based limitations and standards, 40 C.F.R. § 122.44(a)(1), monitoring requirements, 40 C.F.R. § 122.44(i), or required best management practices ("BMPs"), 40 C.F.R. § 122.44(i). The net effect of these tools is to allow permitting agencies to address forest-road discharges in a manner tailored to both the water restoration and maintenance goals of the CWA, as well as the particularized concerns of states or specific permittees. *See, e.g.*, *Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9, 14 (1st Cir. 2012) (describing the NPDES individual permit as "bring[ing] both state ambient water quality standards and technology-based effluent limitations to bear on individual discharges of pollution . . . and tailor[ing] these to the discharger").

EPA claims, however, that its Silvicultural Rule (hereinafter "Rule") exempts from the NPDES permit program silvicultural sources that arise from "road construction and maintenance from which there is natural runoff," 40 C.F.R. § 122.27(b)(1), regardless of whether "ditches, pipes and drains" would "channel, direct, and convey" the discharge. *See* Br. for the

United States as *Amicus Curiae* Supporting Petitioners, at 4. But even assuming, for the sake of argument, that the rule functions as an exception, EPA's interpretation was created not on the basis of the definitions provided by Congress through the CWA, but instead on EPA's determination that sedimentation from the exempted categories is "more effectively controlled by the use of planning and management techniques." EPA, *National Pollutant Discharge Elimination System and State Program Elements Necessary for Participation*, 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976); *see also* EPA, *Notice of Proposed Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads*, 77 Fed. Reg. 53834-01, 53836 (Sept. 4, 2012) ("The EPA believes that the broad range of flexible approaches under section 402(p)(6) may be well suited to address the complexity of forest road ownership, management, and use."); EPA, *Notice of Intent To Revise Stormwater Regulations To Specify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges*, 77 Fed. Reg. 30473-01, 30474 (May 23, 2012) ("EPA believes that stormwater discharges from forest roads should be evaluated under section 402(p)(6) of the Clean Water Act because the section allows for a broad range of flexible approaches that are well-suited to address the complexity of forest road ownership, management, and use.").

In this case, the Ninth Circuit rejected the petitioners' argument that the EPA, through its current Rule, could categorically exempt all stormwater discharges from logging activities resulting from natural runoff. *See Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d at 1079-80. Determining that it was ambiguous, the court reasoned that the Rule – if applicable to all forestry activities "irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into" waters of the United States – itself contravened the CWA, *id.* at 1080, but that the Rule could be construed to be consistent with the statutory definition of point source if it is read to exempt only "natural runoff," that is, runoff that is not collected, channeled, and discharged into waters of the United States from point sources, *id.*

Amici, as former senior environmental officials with experience in managing water pollution, agree with the Ninth Circuit analysis and thus ask the Court to affirm the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

I. Sediment discharges from logging roads arise from limited, identifiable road segments, thereby allowing feasible implementation of an NPDES permit program for logging roads. Logging road structures, which must be constructed to address drainage from storm events to avoid rendering the roads impassable, contain through their very design elements

the means to allow for effective and feasible regulation through a combination of prescriptive and management-based requirements available in NPDES permits.

II. The use of the NPDES permitting program in similar non-logging-road contexts, such as stormwater discharges from Municipal Separate Storm Sewer Systems (MS4s), demonstrates that applying an NPDES permitting program to logging roads is both feasible and not unduly burdensome. Through the MS4 NPDES permit program, and other similar programs, agencies have already been addressing stormwater discharges from road structures for quite some time, using a combination of general and individual permits. They can thus draw from these prior experiences to implement a logging-road NPDES permitting program to accommodate concerns of administrative and technical practicability.

A. General NPDES permits provide one instrument that agencies can use to address concerns of administrative feasibility and still comply with the CWA, and are the primary avenue through which MS4s and many other similar sources are regulated. General permits allow agencies to cover general classes of activities, thereby allowing potential permittees to avoid submitting individual permit applications. They also can contain mechanisms to further streamline the compliance process, and to tailor those permits to state and local contexts.

B. For a limited set of applicants, individual NPDES permits may be required to address circumstances not covered through general NPDES permits. However, these individual NPDES permits can also be streamlined to allay concerns of practicability, by incorporating generalized elements and exceptions for activities found to create limited stormwater discharge.

C. Both general and individual NPDES permits can and do address stormwater discharges through managerial mechanisms, rather than solely relying on technical requirements. As seen in a number of similar NPDES permitting contexts to the ones at issue here, the incorporation of managerial approaches within general and individual permits allows agencies to leverage permittees' internal management structures in order to achieve greater water quality.

ARGUMENT

I. *Amici*'s Experiences with Logging Roads, as well as Current Scientific Research, show that Sediment from Logging Roads Arise from Limited, Identifiable Road Segments

The actual stormwater runoff that arises from logging roads is not uniformly spread throughout the entire forest system, but is instead limited to discrete segments capable of NPDES permitting. *See Legacy Roads and Trails Monitoring Project Update*, at 4;

National Level Assessment, at 14. Thus a general permit could focus planning, construction and operation Best Management Practices (BMPs) on highest priority sources of pollution within the system while being applicable to an entire logging road system. Alternatively, in some instances, leaving out some low priority road segments within a road system under certain circumstances might even be feasible, given the context of a particular road system.

The discrete character of sediment discharge from logging roads is due to the nature of the roads themselves, which must be constructed to address drainage during storm events to avoid rendering them impassable due to flooding and erosion of the roads. Thus such logging roads are often structured to involve systems of ditches (to maintain proper drainage), drainage structures (to deliver road runoff from ditches to the forest floor or other vegetated areas), and relief culverts (drainage structures that are especially effective for removing ditch and road water).

As described in the Brief of Dr. Kevin Boston as *Amicus Curiae* in Support of Respondent, forestry operations are industrial activities, Br. at 3-5, and thus logging roads must be constructed to accommodate such activities. *Id.* at 11-25. These construction designs, in turn, entail identifiable elements that may lead to discharge of sedimentation to waters of the United States. For example, logging roads must be designed to avoid rutting from water that disables designed drainage structures from shedding water

from the road. *Id.* at 14-15. This can be accomplished through choice of road shape, *id.* at 15, and the use of particular drainage systems in combination with the road shape, *id.* at 16-17. Each of these aspects of construction – especially if poorly designed – can create points at which sedimentation can be discharged from logging roads. *Id.* at 18-21. An NPDES permit program, with the combination of prescriptive and management-based requirements available to agencies, can provide a feasible and effective means of addressing such discharges.

II. *Amici*'s Experiences Demonstrate that Managing Stormwater Discharges from Logging Roads Through NPDES Permitting is both Feasible and not Unduly Burdensome

As environmental officials familiar with implementing the NPDES permit program in a number of areas, we view the application of NPDES permits to stormwater discharges from logging roads to be both feasible and not unduly burdensome. Nevertheless, Petitioners, and *amici* writing on behalf of the petitioners, contend that the NPDES permit program cannot address the management of stormwater discharges arising from logging roads, and suggest it should be limited to manufacturing activities. *See* Br. *Amicus Curiae* of Pacific Legal Foundation, et al., in Support of Petitioners, at 12-18. Experience shows these concerns are unwarranted. Instead, agency officials have found a number of efficient and effective

approaches to using the permitting mechanisms of the Clean Water Act, including general permits, to address a variety of pollution problems from discharges not associated with traditional manufacturing activities. *See, e.g.*, 40 C.F.R. § 122.28(a)(4) (allowing, for municipal separate storm sewers, an agency to issue permits on a "system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges"). This includes administering agencies' experience with using the NPDES permit program – through a combination of general and individual permits – to manage stormwater discharges from municipal road systems to state highway systems, 40 C.F.R. § 122.32.

Stormwater within the system of logging roads could be managed in much the same manner that stormwater has been successfully and feasibly managed for non-logging roads under the CWA. There are over 55 million miles of non-logging paved roads in the United States. Under the current NPDES regulatory program, roads within the boundaries of large, medium and small MS4s are part of the NPDES regulatory program and are almost entirely subject to the implementation of Best Management Practices (BMPs) as outlined in their permits, as explained later in this brief. In addition, under the authority of 40 C.F.R. § 122.26(a)(1)(v), additional segments or systems of storm sewers may be designated as needing NPDES permit coverage based on factors including the volume, pollutant nature, frequency, location

with respect to high quality or impaired water body segments or other water quality considerations. These designated segments or systems of MS4s are essentially all subject to BMPs under the terms of NPDES permits.

Section 402(p) of the CWA provides unique authority to manage uncontrolled sources of pollution. 33 U.S.C. § 1342(p). It is through this authority that EPA, working as required by the provision with the States, could implement a system of effective and efficient controls to manage stormwater from forest roads in high priority locations to protect water quality. As outlined elsewhere, controls relying on general permits and BMPs would provide these effective and efficient tools.

A. Stormwater Discharge Permits for Other Similar Systems Demonstrate that General NPDES Permits Would Create Streamlined Processes for Individual Owners with Single Stormwater Pollution Prevention Plans

When entire classes of dischargers discharge pollutants of a similar nature in a similar manner, as with the logging roads at issue here, administering agencies have used general NPDES permits to "greatly reduce [the] administrative burden by authorizing discharges from a category of point sources within a specified geographic area." 40 C.F.R. § 124.19(a); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 n. * (2004)

(citing 40 C.F.R. § 122.28(b)(2)(v)). This has been used widely in the context of regulating discharges from similar contexts such as transportation roads, 40 C.F.R. § 122.32(a) (including within its scope "systems operated by . . . State departments of transportation"), to avoid subjecting most entities from the requirement to apply for individual permits.

Administrating agencies can use general permits to simplify and streamline the permitting process while achieving compliance with the CWA. *See Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency*, 344 F.3d 832, 881 (9th Cir. 2003); *see also* Jennifer L. Seidenberg, Note, *Texas Independent Producers & Royalty Owners Ass'n v. Environmental Protection Agency: Redefining the Role of Public Participation in the Clean Water Act*, 33 ECOLOGY L.Q. 699, 705 (2007) (describing the purpose behind the use of general permits for storm water discharges); Kathleen A. McGinty, *Pennsylvania's Approach to Sustainable Development*, 19 NAT. RES. & ENV'T 46, 49 (2004) (describing the State of Pennsylvania's advocacy of general permits to ease burdens for applicants while still meeting the requirements of the CWA). Rather than evaluate each polluting activity through individual applications for permits, an agency may issue a general permit for certain categories of activities. 40 C.F.R. § 122.28.

This process, in turn, allows an entity that believes itself to be covered by a general permit to fulfill

its permitting requirement by submitting a "notice of intent"[2] to discharge pursuant to the general permit. 40 C.F.R. § 122.28(b)(2); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 n. * (2004) ("Once [the] EPA or a state agency issues such a [general] permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions."). If that proposed discharge does indeed fall within the scope of the general permit, the entity need not go through the individual permit process, but instead can simply comply with the terms of the general permit.[3] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. at 108 n. *. Such is

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[2] In some situations, the burdens may be even lighter on entities. Under 40 C.F.R. § 122.28(b)(2)(v),

> Discharges other than discharges from publicly owned treatment works, combined sewer overflows, municipal separate storm sewer systems, primary industrial facilities, and storm water discharges associated with industrial activity, may, at the discretion of the Director, be authorized to discharge under a general permit without submitting a notice of intent where the Director finds that a notice of intent requirement would be inappropriate.

[3] This can be a relatively speedy process; for example, in the case of EPA's Multi, this process usually commences in within 30 days subject to monitoring and reporting requirements. EPA, *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP)*, Authorization to Discharge under the National Pollutant Discharge Elimination Program [hereinafter MSGP], tbl. 1-2 (May 27, 2009), *available at* <http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf>.

the case with most entities, where 96% of regulated entities that discharge stormwater take advantage of the general permit program without need for individual permits. Declaration of James Hanlon (Docket #98-3) at 8; *see also* Mark F. Cecchini-Beaver, Note and Comment, *"Tough Law" Getting Tougher: A Proposal for Permitting Idaho's Logging Road Stormwater Point Sources after* Northwest Environmental Defense Center v. Brown, 48 IDAHO L. REV. 467, 505 (2012) ("More recently, the EPA's Assistant Regional Counsel for Idaho, writing on his own behalf, found it 'unlikely' that individual permits would be required.") (citing Mark A. Ryan, *Ninth Circuit Upends the CWA Applecart*, 25 A.B.A. J. NAT. RES. & ENV'T 50, 51 (Winter 2011)).

These general permits are both feasible and valuable tools for addressing pollution problems arising from a number of systems, by allowing administering agencies to structure such aspects as effluent standards, *see* 40 C.F.R. § 122.41(a)(1); mitigation, 40 C.F.R. § 122.41(b); monitoring and reporting, *see* 40 C.F.R. § 122.41(d), (j) & (l); and operation and maintenance, *see* 40 C.F.R. § 122.41(e), in order to fulfill the requirements of the CWA. Indeed, such concerns have many common elements that could be covered in a general permit, including: pollutants of concern (sediment, temperature, some chemicals related to road use and maintenance); road layout (*e.g.*, avoid wetlands and steep grades, minimize stream crossings); road and stream crossing design, operation, maintenance road closure, and road removal. As such,

well-implemented plans required in a general permit covering these and other widely understood elements would provide a feasible way of protecting water quality as required by the CWA. Moreover, such general permits can be and also are tailored to state and regional concerns. *See* 40 C.F.R. § 122.44. Even in the context of traditional industrial pollution, EPA's (earlier) general permit for covering stormwater discharge associated with industrial activity (except discharges from construction activity) includes state-specific requirements imposed by state certification under Section 401 of the Clean Water Act. 33 U.S.C. § 1341. *See* EPA, *General Permits for Storm Water Discharges Associated with Industrial Activity*, 57 Fed. Reg. 41236-0, 41237 (Sept. 9, 1992).

Such general permits have already been successfully used – despite *amici* descriptions of administrative challenges, *see* Br. *Amicus Curiae* of Pacific Legal Foundation, et al., in Support of Petitioners, at 12-15 – to address pollutants resulting from stormwater discharges, through the coverage of municipal separate storm sewer systems, which in turn cover road systems, 40 C.F.R. § 122.26(b)(8) (defining "municipal separate storm sewer systems as including "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains"); EPA, Road-Related Municipal Separate Storm Sewer Systems, *available at* <http://cfpub.epa.gov/npdes/stormwater/municroads/home.cfm>. *See, e.g.*, EPA, *Notice of Availability of Draft National Pollutant Discharge Elimination System (NPDES)*

General Permits for Small Municipal Separate Storm Sewer Systems (MS4) [for regions in Massachusetts as part of EPA Region 1], 75 Fed. Reg. 5788-01 (Feb. 4, 2010) (covering, among other things, "non-traditional transportation systems"); EPA, *Notice of Availability of Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Small Municipal Separate Storm Sewer Systems (MS4) [for "discharges from small MS4s to certain waters of the states of New Hampshire and Vermont, and to certain waters on Indian Country lands in the states of Connecticut and Rhode Island"]*, 73 Fed. Reg. 78786-01 (Dec. 23, 2008); EPA, *Final NPDES General Permits for Small Municipal Separate Storm Sewer Systems (sMS4s) in New Mexico, Indian Country Lands in New Mexico and Indian Country Lands in Oklahoma; Minor Revisions and Corrections*, 72 Fed. Reg. 32654-01 (June 13, 2007); EPA, *Notice of Availability of NPDES Storm Water General Permit for Small MS4s [for EPA Region 9]*, 67 Fed. Reg. 58802 (Sept. 18, 2002).

These general permits, in turn, often include the use of particular management techniques in order to address discharges resulting from these systems. *See, e.g.*, EPA, *2003 General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) [for MA and NH]* at 19 (May 1, 2003), *available at* <http://www.epa.gov/region1/npdes/permits/permit_final_ms4.pdf> (requiring a general permittee to "[i]nclude, at a minimum, maintenance activities for . . . roadway drainage system maintenance"); *id.* at 20-35 (describing the Massachusetts

and New Hampshire transportation MS4). Such techniques can include requiring dischargers to develop and implement Storm Water Management Programs (SWMPs) that include, among other things, "Public Education and Outreach on Storm Water Impacts," "Illicit Discharge Detection and Elimination" provisions, and "Pollution Prevention/Good Housekeeping for Municipal Operations." *See, e.g.*, EPA, *Notice of Availability of NPDES Storm Water General Permit for Small MS4s [for EPA Region 9]*, 67 Fed. Reg. 58802 (Sept. 18, 2002); EPA, *2003 General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) [for MA and NH]* at 20-35.

General permit requirements can also include the use of BMPs that act as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal or drainage from raw material storage." EPA, *2003 General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) [for MA and NH]* at 40.

As seen in the SWMP context, such management techniques can also be adapted to reflect concerns of feasibility and effectiveness, based upon experiences with the use of those techniques. For example, a general permit can require that outfall identification

for roadway systems be done on a less individualized basis, in order to address feasibility concerns. *See, e.g., id.* at 30 ("Due to the magnitude of a transportation agency's drainage system, identification of outfalls may be done on a district basis, and as part of construction and redevelopment projects."). General permits requiring the use of BMPs in turn may be modified if the original BMP has been demonstrated to be either infeasible or ineffective. *See, e.g., id.* at 20. Moreover, general permits can also be designed to contain exceptions for particular discharges – again to address particular implementation concerns. *See, e.g., id.* at 8 (listing exceptions for non-storm water discharges).

Such a panoply of flexible techniques has allowed water managers to tailor general permits to address concerns of practicability while also complying with the CWA. Given this ample experience with other similar contexts, we expect that the NPDES permit program can be feasibly and effectively applied to the logging roads at issue here.

B. Stormwater Permits for Other Similar Systems Demonstrate Individual Permit Programs – Through Their State Implementation – are Tailored to be Local in Nature

Individual NPDES permits can be tailored towards local conditions for those very limited sets of activities that are likely to fall outside of any general

permit program. *See* Declaration of James Hanlon (Docket #98-3) at 8. But although these individual permits involve an individualized application process, *see, e.g.*, 40 C.F.R. § 122.21(h), an individual permit requirement does not necessarily mean that each individual outflow would require separate individual NPDES permits. As our experience managing the large and municipal separate storm sewer systems demonstrates, even when a general permit is unavailable to an individual operator, that operator need simply submit a permit application that identifies "the location of known municipal storm sewer system outfalls discharging to the waters of the United States." 40 C.F.R. § 122.26(d)(1)(iii)B)(1). What that operator receives as a result is not a series of separate permits for each individual outflow point, but rather a single permit that covers the entire municipal storm sewer system (either on a jurisdiction-wide or discharge-wide basis), including those individual outflow points. 40 C.F.R. § 120.26(d).

The manner in which individual permits can be structured to provide broad, flexible coverage can be seen in an examination of individual MS4 permit terms. For example, the individual NPDES MS4 permit for Dayton, Ohio, is expressly structured to cover "the corporate boundary of the City of Dayton served by the Permittee's Municipal Separate Storm Sewer System," Ohio Environmental Protection Agency, *Authorization to Discharge under the NPDES for City of Dayton, Ohio EPA Permit No. 1PI00003*DD*, at 2 (Sept. 12, 2011), *available at* <http://www.epa.ohio.gov/

portals/35/storm/Dayton_1PI00003_DD.pdf>, which in turn can include "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, [and] storm drains," *id.* at 41. The permit focuses primarily on creating generalized requirements, such as the adoption of public education and participation programs to reduce litter, pet waste, and other sources of pollutants from being carried by the stormwater system to waters of the United States, *id.* at 9-12, the development of illicit discharge detection plans, *id.* at 14-17, and the use of monitoring and reporting, *id.* at 30-32. Moreover, individual outfalls are not addressed in a particularized way; rather, the permit requires the permittee to develop its own individual map on its own, assessing storm water outfalls for use in implementation and assessment of the other provisions of the permit. *Id.* at 10.

As with the general permits described earlier, an individual permit can also be structured to address feasibility concerns in a manner consistent with the Clean Water Act. The Dayton NPDES MS4 permit, for example, allows for the replacement of BMPs that turn out to be ineffective or infeasible. *Id.* at 5. And even specific requirements are structured to allow for tailoring "appropriate for the City," *id.* at 21 (allowing a range of BMPs), as well as for prioritization according to potential impacts, *id.* at 26 (describing prioritization allowed for street-sweeping programs).

Similar provisions can be seen in other individual permits around the country. *See, e.g.*, Oregon Department of Environmental Quality, *NPDES Stormwater Discharge Permit for City of Ashland, Permit No. 102891* (Feb. 12, 2007), *available at* <http://www.deq.state.or.us/wq/pn/permits/ashland.pdf>. The point of these examples is not to provide a comprehensive survey of all individual MS4s across the nation, but to demonstrate that agencies can and do use a number of techniques to address concerns of feasibility while simultaneously fulfilling the requirements of the CWA. Administering agencies can thus draw from these prior successes with storm sewer systems (which, as explained earlier, include transportation systems) to apply the NPDES permit program to logging roads in similar feasible and nonburdensome ways.

C. Both Aspects of the NPDES Permit Program Allow for, Rather than Hinder, Broader Managerial Solutions Through the use of best Management Practices

As described in the introduction, EPA premises its approach of excluding logging roads from the NPDES permit program on the grounds that logging roads are "more effectively controlled by the use of planning and management techniques." *Cf.* Br. of the Society of American Foresters et al. as *Amicus Curiae* in Support of Petitioners, at 12-30 (suggesting that NPDES exclude the use of BMPs). But this

mischaracterizes the NPDES permit program as excluding planning and management techniques.

Rather, our experience demonstrates that the NPDES permit program has been used in a number of instances to apply planning and management approaches to systems of similar complexity. One of these ways is through the use of Stormwater Pollution Prevention Plans (SWPPPs) and Best Management Practices (BMPs) that incorporate planning and managerial approaches into other NPDES permitting systems.

For example, EPA's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP), issued by the EPA to cover a number of operators of stormwater discharges associated with industrial activity, requires general permittees to prepare SWPPPs for permit coverage. EPA, *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity* pt. 5 (May 27, 2009), *available at* <http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf>. A number of aspects of these SWPPPs involve either planning or management approaches, rather than engineering approaches. SWPPPs must plan and manage good housekeeping measures, maintenance measures, spill prevention and response procedures, and employee training. *Id.* pt. 5.1.5.1. SWPPPs must also address discharges through a series of management techniques, which allow for the implementation of "appropriate control measures," as well as other strategies to minimize pollutants in discharges. *Id.*

pt. 2.1.2.6. SWPPPs are also encouraged to address erosion and sediment using BMPs. *Id.* pt. 2.1.2.5. Similar types of management approaches can be seen in state permits for similar activities. California's draft general permit for waste discharge requirements for storm water discharges from small municipal separate storm sewer systems, for example, would require the use of BMPs to reach the requirements of the CWA. *See* California State Water Resources Control Board, *National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000004*, at 5-6, 8-13 (Apr. 30, 2003), *available at* <http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2003/wqo/wqo2003_0005dwq.pdf>.

Another example of the existing capacity of state environmental agencies to use managing and planning techniques in the context of NPDES permitting is the program that Colorado has used to regulate stormwater discharges from oil and gas construction sites. *See* Colorado Department of Public Health and Environment, *General Permit for Stormwater Discharges Associated with Construction Activity* (May 31, 2007), *available at* <http://www.colorado.gov/cs/Satellite/CDPHE-WQ/CBON/1251596875260>. While a permit system for oil and gas construction sites is not required under federal law, *see* Energy Policy Act of 2005, Section 323, P.L. 109-58 (Aug. 8, 2005) (exempting such activities from EPA's stormwater permitting regime), Colorado has nevertheless chosen to implement a permit program under which an applicant must include a certification that the

operator has developed and will implement a Stormwater Management Plan (SWMP). 5 Colo. Code Regs. 1002-61, Section 61.2. This SWMP, in turn, must identify BMPs that will meet the terms and conditions of the general state permit, which in turn are used to reduce the pollutants in stormwater discharges associated with oil and gas construction activity. *See* Colorado Department of Public Health and Environment, *General Permit for Stormwater Discharges Associated with Construction Activity*, at 10-14. These BMPs, in turn, can include a variety of planning and management elements, such as erosion and sediment controls. *See* Phillip R. Clark, et al., *Managing Risk in Oil and Gas Acquisition*, 2008 No. 4 Rocky Mountain Mineral Law Foundation Paper on Strategic Risk Management for Natural Resources Companies and Their Advisors, No. 8.

Management tools such as SWPPPs and BMPs can provide a feasible and effective means for addressing pollution arising out of complex systems, including logging roads. As scholars have observed, BMPs and other management strategies "tend not to impose one-size-fits-all standards, but instead give firms responsibility for developing their own responses to environmental problems, thereby leveraging firms' superior knowledge about the risks they generate and the potential methods of reducing those risks." Cary Coglianese, *The Managerial Turn in Environmental Policy,* 17 N.Y.U. ENVTL. L.J. 54, 55 (2008); *see also id.* at 70 (describing the use of BMPs as potentially allowing for "more creative, less rigid,

more holistic management that fosters outside-the-box thinking," depending upon the implementation). Their use in the permitting context thus leverages permittees' internal management structures in order to achieve greater water quality. *Cf. id.* at 60-61 (describing management-based regulations as "premised on the notion that a firm's internal management critically shapes its impact on environmental quality. This underlying assumption is gaining support in a growing body of academic research."). Given the use of these tools in other similar contexts, we expect that they can also be used for logging roads in order to achieve CWA compliance in an effective and feasible manner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Nos. 11-338 and 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, IN HIS OFFICIAL CAPACITY AS OREGON STATE FORESTER, ET AL.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., ET AL.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE WESTERN DIVISION OF THE AMERICAN FISHERIES SOCIETY *ET AL.* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amici curiae are a professional scientific society and two individual scientists who specialize in the area of fisheries biology as well as watershed conservation and restoration. They have a strong interest in the protection of freshwater ecosystems and aquatic species from water pollution caused by stormwater run-off from industrial logging roads. All have been concerned about the issue of sediment pollution from logging roads for decades. Amici believe that the Ninth Circuit's decision will help control the continued, pervasive, and harmful pollution of rivers and streams from forest logging roads.

The Western Division of the American Fisheries Society (WDAFS) is a 3,000 member professional society representing fishery scientists and managers working in academia, government, non-governmental organizations, and the private sector. The WDAFS includes ten Chapters representing Society members residing in the States of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming; U.S. associated entities in the West Pacific Ocean; the Province of British Columbia and the Yukon Territory in Canada; and Mexico. The mission of the WDAFS is to improve the conservation and sustain-

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[1] All parties have filed letters of blanket consent to the filing of amicus curiae briefs. Pursuant to Supreme Court Rule 37.6, Amici certify that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than Amici Curiae or their counsel, has made a monetary contribution to the preparation and submission of this brief.

ability of fisheries resources and aquatic ecosystems by advancing fisheries and aquatic science.

Dr. Christopher A. Frissell is a research scientist in the field of freshwater ecology and conservation, with an emphasis on salmonid fish of the western United States. Dr. Frissell has worked as a Research Assistant Professor at Oregon State University and the University of Montana, a Research Associate Professor and Affiliate Research Associate Professor at The University of Montana, and a Senior Staff Scientist and Director of Science and Conservation with Pacific Rivers Council. Dr. Frissell has Ph.D. and M.S. degrees in Fisheries Science from Oregon State University, and a B.A. in Zoology from The University of Montana. He has been a member of the American Fisheries Society for more than 30 years. He has published numerous journal articles, book chapters, and books on the subject of salmonid fish conservation and restoration ecology, including the environmental effects of logging roads on salmon habitat and populations. Dr. Frissell has also conducted field research in streams and rivers across Oregon, with a focus on forestry-related land uses and their impact on watersheds and salmon habitat, as well as served as a technical expert for the Oregon Department of Forestry on various forestry and aquatics issues.

Richard K. Nawa is a staff ecologist for the Klamath-Siskiyou Wildlands Center in Ashland, Oregon. Mr. Nawa holds a Masters Degree in zoology from Southern Illinois University. He was also previously employed by Tioga Resources, Inc., in Roseburg, Oregon, to write stream survey reports for streams on U.S. Forest Service lands. Mr. Nawa has been an active member of the Oregon chapter of the American Fisheries Society since 1988.

In this brief, Amici discuss the aquatic and natural resource protection problems caused by polluted water directed into rivers and streams through pipes, ditches, and channels from industrial forest logging roads. We do not address the legal arguments of the case in chief.

SUMMARY OF ARGUMENT

Protection and restoration of our nation's water quality is a fundamental tenet of the Clean Water Act. Water pollution caused by stormwater run-off from industrial logging roads, primarily in the form of excess sediment, harms all stages of aquatic life. Yet despite research showing both the harm from logging road run-off and the need to control it, individual states continue to allow large amounts of pollution from logging roads to enter our rivers and streams through pipes, ditches, and channels. This pollution in turn harms and kills fish and other aquatic organisms essential to a healthy watershed. Application of the point source permitting system to industrial logging roads is an essential tool for regulators to lessen the degradation of our nation's waterways.

ARGUMENT

I. THE NEED FOR HEALTHY WATERS

Water is the life blood of the landscape. Healthy rivers, streams, and wetlands play central roles in both human and natural environments. They moderate periods of drought and flood, provide cool, clean water to drink, and host diverse communities of plants and animals when in good condition. However, the precipitous decline of many aquatic species reveals that the nation's waters are in peril.

Pacific Coast salmon[2] provide a particularly sobering example of the inadequacy of aquatic conservation efforts. Most salmonids are "anadromous." This means that salmon eggs are hatched and the young reared for the first portion of their life cycle only in freshwater streams, primarily in forested areas. As juveniles, they migrate downstream to occupy salt water estuaries and coastal wetlands, where they adapt to ocean conditions. They then spend their next three to five years growing to maturity in the ocean, after which they migrate back to their native river systems, eventually returning to the very same stream from which they were spawned in order to lay their eggs for the next generation.

Because salmon are genetically adapted to each particular river system, Pacific salmon are especially sensitive to the health of their inland watersheds. The life needs of various salmonid species vary, but several—including coho salmon, cutthroat, and steelhead—are particularly dependent on upriver forest habitat. Salmon need cold, clear water, widespread gravel beds with little fine silt in which to deposit their eggs, and abundant pools where their young can find food and shelter.

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[2] As used in this brief and as most commonly used, the term "salmon" means any of seven major species of fish which are members of the genus *Oncorhynchus*, which includes chinook or king salmon (*Oncorhynchus tshawtscha*), coho or silver salmon (*Oncorhynchus kisutch*), coastal searun cutthroat (*Oncorhynchus clarki clarki*), steelhead (*Oncorhynchus mykiss*), chum salmon (*Oncorhynchus keta*), pink salmon (*Oncorhynchus gorbuscha*) and sockeye or red salmon (*Oncorhynchus nerka*). As a genus, these species are also often lumped together and called "salmonids."

Yet largely as a result of widespread inland habitat destruction by human activities, many wild Pacific salmon runs are facing extinction. According to a 1991 comprehensive scientific stock assessment by the American Fisheries Society (the largest organization of fisheries scientists in the world), 214 distinct stocks of anadromous fish in California, Idaho, Oregon, and Washington were identified as at risk of extinction, and the same report noted over 100 stocks already gone forever.[3] Since that 1991 report was written, 28 populations of salmonids have been listed for protection under the federal Endangered Species Act.[4]

Salmon, however, are only the tip of the iceberg. Over seventy percent of native freshwater mussels are vulnerable to extinction.[5] The current and projected extinction rate for freshwater animal species is five times higher than for terrestrial species.[6] North

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[3] W. Nehlsen *et al.*, *Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho, and Washington*, FISHERIES, 16(2):4-21 (March-April 1991), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/exhibits/sfwc/spprt_docs/sfwc_exh3_nehlsen.pdf (last visited Oct. 15, 2012).

[4] Endangered Species Act Status of West Coast Salmon and Steelhead, *available at* http://www.nwr.noaa.gov/ESA-Salmon-Listings/upload/1-pgr-8-11.pdf (last visited Oct. 15, 2012).

[5] J.D. Williams *et al.*, *Conservation Status of Freshwater Mussels of the United States and Canada*, FISHERIES, 18(9):6-22 (1993).

[6] A. Ricciardi and J.B. Rasmussen, *Extinction Rates of North American Freshwater Fauna*, CONSERVATION BIOLOGY, 13:1220-22 (1999).

American amphibians also show a similarly acute incidence of extinction and range contraction.[7]

The loss of aquatic diversity is an economic, as well as biological, disaster. In the 1990s, reductions in salmon catches from California to Alaska resulted in losses of hundreds of millions of dollars to local and regional economies.[8]

In addition to producing commercially extractable resources such as salmon, healthy watersheds provide a variety of economically valuable ecosystem-based services—such as clean air and water, scenic beauty, recreational opportunity, and wildlife—that have real implications for the vitality of many local economies. Clean water has been recognized widely as a valuable ecosystem service that is vulnerable to watershed degradation and worth a considerable monetary investment to secure.

> [W]hile most Americans may live in urban areas, most of us are also dependent upon rural lands, particularly forest lands for clean water and a healthy climate. For these reasons, conserving our forests is not a luxury. It is, in my view, a necessity.

U.S. Department of Agriculture Secretary Thomas Vilsack.[9] Local municipalities have discovered that

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[7] AMPHIBIAN DECLINES: THE CONSERVATION STATUS OF UNITED STATES SPECIES (M. Lanoo, ed., 2005).

[8] *See generally* Amicus Br. of Pacific Coast Federation of Fishermen's Associations *et al.*

[9] U.S. Department of Agriculture Secretary Thomas Vilsack, Remarks on Forest Management in Seattle, Washington (Aug. 14, 2009), *available at* http://www.fs.fed.us/video/tidwell/vilsack.pdf (last visited Oct. 15, 2012).

the most cost-effective water treatment plant is a healthy watershed and—like Portland, Oregon and New York City—have invested heavily in efforts to permanently protect and restore the integrity of the watershed from which they derive their water. *See also* Roadless Area Conservation Rule, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (more expensive treatment of municipal drinking water supplies necessary when forested watersheds not protected).

II. FOREST LOGGING ROADS POSE A MAJOR THREAT TO THE HEALTH OF OUR NATION'S RIVERS AND STREAMS.

A. Forest Logging Roads Deliver Harmful Sediment and Other Pollutants to Rivers and Streams.

Global, national, regional, and local assessments consistently identify logging roads as among the foremost and lasting threats to watershed condition, water quality, aquatic diversity, and fisheries.[10] Logging roads—carefully engineered surfaces of crushed rock and gravel—gradually wear away under the

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[10] *See, e.g.*, Forest Ecosystem Management and Assessment Team (USDA Forest Service, BLM, USFWS, NOAA, EPA and National Park Service), *Forest Ecosystem Management: An Ecological, Economic and Social Assessment* (1993); T. Quigley *et al.*, *Integrated Scientific Assessment for Ecosystem Management in the Interior Columbia Basin*, US Forest Service General Technical Report PNW-GTR-382 (1996); R.T.T. Forman and L.E. Alexander, *Roads and Their Major Ecological Effects*, ANNUAL REVIEW OF ECOLOGY AND SYSTEMATICS, 29:207-31 (1998); H. Gucinski *et al.*, *Forest Roads: A Synthesis of Scientific Information*, US Forest Service General Technical Report PNW-GTR-509 (2001); K.H. Ritters and J.D. Wickham, *How Far to the Nearest Road?* FRONTIERS IN ECOLOGY AND ENVIRONMENT, 1:125-29 (2003).

combination of heavy logging trucks and falling rain. *See* Respondent's Br. at 6-7. These roads, with manmade pipes, ditches, and channels that send stormwater into rivers and streams, alter the chemical, biological, and human use aspects of ecosystems within at least several hundred meters of the road's location. The photograph below shows sediment-laden stormwater from an industrial logging road directed through such pipes and ditches.

[11]

By altering hydrology and generating sediment and nutrients, roads alter aquatic ecosystems. The impact of logging roads can threaten aquatic species and water quality for domestic or commercial users many kilometers downstream.[12]

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[11] Sediment from private logging road collects in roadside ditches, washes into channel that passes through culvert, then flows into the Lewis and Clark River, a major salmon stream in Northwest Oregon. Jan. 27, 2005. Photo: C.A. Frissell.

[12] S.C. Trombulak and C.A. Frissell, *Review of Ecological Effects of Roads on Terrestrial and Aquatic Communities*, CON-

(*Footnote continued*)

As the Forest Service recently explained, "[e]xpansive road networks [ ] can impair water quality, aquatic habitats, and aquatic species in a number of ways, often to a greater degree than any other activities conducted in forested environments. ... These deteriorating road conditions threaten our ability to manage forests and pose significant risks to watersheds."[13] And as the federal expert fisheries agency emphasized, "[r]oad networks in many upland areas of the Pacific Northwest are the most important source of management-accelerated sediment delivery to anadromous fish habitats. The sediment contribution to streams from roads is often much greater than that from all other land management activities combined."[14]

The acknowledged harm to watersheds and aquatic resources from logging roads is expected to increase under nearly all projected climate change scenarios.[15] Increased storm intensity, transition

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SERVATION BIOLOGY, 14(1):18-30 (2000); J.A. Jones *et al.*, *Effects of Roads on Hydrology, Geomorphology, and Disturbance Patches in Stream Networks*, CONSERVATION BIOLOGY, 14:76-85 (2000).

[13] USDA Forest Service, Water, Climate Change, and Forests: Watershed Stewardship for a Changing Climate (June 2010) at 72, *available at* http://www.fs.fed.us/pnw/pubs/pnw_gtr812.pdf (last visited Oct. 15, 2012).

[14] Factors for Decline: A Supplement to the Notice of Determination for West Coast Steelhead Under the Endangered Species Act (Aug. 1996) at 19, *available at* http://www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Reports-and-Publications/upload/stlhd-ffd.pdf (last visited Oct. 15, 2012) (citations omitted).

[15] J. Battin *et al.*, *Projected Impacts of Climate Change on Salmon Habitat Restoration*, PROCEEDINGS OF THE NATIONAL

(*Footnote continued*)

from snowmelt to rainfall-dominated hydrology, and increased extent and frequency of rain-on-snow-driven floods all tend to increase the role of logging roads in diverting surface flow and the vulnerability of these roads to erosion.

Federal, state, and local agencies have long acknowledged the pollution problem posed by forest logging roads. As the U.S. Environmental Protection Agency (EPA) has explained, "[r]oads are considered to be the major source of erosion from forested lands, contributing up to 90 percent of the total sediment production from forestry operations."[16] Nationwide, EPA identifies sediment as the second largest identified cause of water quality impairment, with the related categories of habitat alteration (6th), temperature (10th), and turbidity (15th) following. Forestry (silviculture), including road construction and use, is listed as the 11th largest probable source group for this pollution.[17]

According to an EPA-commissioned report, "forestry-related sediment is a leading source of water

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ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA, 104:6720-25 (2007); M.J. Furniss *et al., Water, Climate Change, and Forests: Watershed Stewardship for a Changing Climate,* US Forest Service General Technical Report PNW-GTR-812 (2010).

[16] Coastal Waters Guidance, Chapter 3.I.E.2, "Road Construction and Use," *available at* http://www.epa.gov/owow/nps/MMGI/Chapter3/ch3-1.html (last visited Oct. 15, 2012).

[17] EPA, Watershed Assessment, Tracking and Environmental Results: National Summary of State Information, http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last visited Oct. 15, 2012) (compiling most current available data from states' Clean Water Act lists of impaired waters).

quality impairment to rivers and streams nationwide." National Level Assessment of Water Quality Impairments Related to Forest Roads and Their Prevention by Best Management Practices (2008) at 2.[18] While many logging roads are designed to discharge stormwater onto the forest floor, *see* Respondent's Br. at 7, in certain areas in the Pacific Northwest, a large percentage of this sediment-laden water directly enters rivers and streams through engineered logging road drainage systems—manmade pipes, ditches, and channels. National Level Assessment at 43-44, 49; *see also* Oregon Dep't of Forestry, Forest Roads, Drainage and Sediment Delivery in the Kilchis River Watershed (1997) at 4-5.[19]

The water quality problems with salmon habitat on private forestlands have long been recognized. In 1998, the Oregon Department of Environmental Quality listed more than 3,000 stream miles on private forestlands statewide as violating water quality standards. Over 25% of the waters designated as impaired for temperature, sediment, and habitat modification occurred on private forestlands. The percentages are even higher in the North Coast region of Oregon.

The in-the-river situation in Oregon has not improved with time. Oregon's 2006 list of impaired waters includes approximately 12,000 stream miles listed as violating water quality standards for sedi-

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[18] *Available at* http://www.wildlandscpr.org/national-level-assessment (last visited Oct. 15, 2012).

[19] *Available at* http://www.oregon.gov/odf/privateforests/docs/kilchis.pdf (last visited Oct. 15, 2012).

ment or turbidity.[20] Similarly, hundreds of thousands of river miles in states across the nation are impaired by sediment pollution.[21]

B. Sediment Impacts on Fish and Aquatic Life.

Both fine and coarse-grained sediment harms water quality and aquatic species. National Level Assessment at 16-20, 31-38. For salmon, excess sediment hurts all freshwater life-stages—migration, spawning, egg incubation, and juvenile rearing.

Coho salmon provide a good example of the various freshwater habitat requirements most anadromous fish need to survive. Across their freshwater life stages, coho salmon tend to benefit from habitat that is relatively cold and near natural levels of fine and suspended sediment.

Adult coho salmon return to their natal spawning tributaries to construct nests in which to deposit and fertilize their eggs. As they ascend the river and enter smaller streams nearer spawning areas, migrating adult fish require cool waters with deep pools and woody debris or other structure to provide shelter from predators. Spawning migrations and breeding

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[20] Site-specific Targeted Monitoring Results: Causes of Impairment, Oregon Rivers and Streams 2006, *available at* http://ofmpub.epa.gov/waters10/attains_state.control?p_state=OR (last visited Oct. 15, 2012).

[21] EPA, Watershed Assessment, Tracking and Environmental Results: Causes of Impairment in Assessed Rivers and Streams, *available at* http://ofmpub.epa.gov/waters10/attains_nation_cy.control (last visited Oct. 15, 2012) (interactive map linking to individual state lists of pollution, by type, in rivers and streams).

take place from September through March in most coastal streams where wild coho salmon remain.

Eggs remain in and develop in the gravel for two to three months, during which time they require cold temperatures, free exchange of highly oxygenated waters, and stable streambeds. Larvae emerge from the eggs and remain relatively inactive within the gravel streambed interstices until they move into the water column and become mobile. Once the larvae become free-swimming, they require food and clean water in which to see and capture that food. The young fish are also vulnerable to downstream displacement by late season floods.

As the juvenile fish enter summer, they grow rapidly until stream temperatures grow too high, and physiological demands outweigh available food resources. As fall and winter months approach, juvenile coho migrate to deeper pools and beaver ponds to shelter from winter storms. The juveniles spend the rainy and flood-rich winter months in these sheltering habitats, then most turn downstream and migrate to the sea as smolts in the spring months of their second year of freshwater residence.

Increased river sedimentation affects all these life-stages. During the two to three months that salmon eggs incubate in the gravel at the river bottom, increased fine sediment in the water reduces available oxygen. More directly, sediment can bury and smother eggs. Increased sediment loads can also cause streambeds to become unstable,[22] leading to

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[22] C.A. Frissell *et al.*, *A Resource in Crisis: Changing the Measure of Salmon Management,* PACIFIC SALMON AND THEIR ECOSYSTEMS (D.J. Stouder *et al.* eds. 1997) at 411-44.

the scouring of the river bottom—salmon eggs and all.

Suspended sediments can act directly on fish by killing them. Common sublethal effects, such as reduced growth of juvenile coho that contribute to mortality later in the life cycle, affect a larger area of habitat and more individuals. Excess sediment can interfere with developing eggs and larvae, reduce the abundance of food for fish, and reduce the ability of fish to catch their prey.[23]

> [E]ffects of sedimentation on salmonids are well-documented and include: clogging and abrasion of gills and other respiratory surfaces; adhering to the chorion or eggs; providing conditions conducive to entry and persistence of disease-related organisms; inducing behavioral modifications; entombing different life stages; altering water chemistry by adsorption of chemicals; affecting useable habitat by scouring and filling pools and riffles and changing bedload composition; reducing photosynthetic growth and primary production; and affecting intergravel permeability and dissolved oxygen levels.[24]

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[23] C.P. Newcombe and D.D. MacDonald, *Effects of Suspended Sediments on Aquatic Ecosystems*, NORTH AMERICAN JOURNAL OF FISHERIES MANAGEMENT, 17:72-82, 73 (1991).

[24] Factors for Decline: A Supplement to the Notice of Determination for West Coast Steelhead Under the Endangered Species Act (Aug. 1996) at 17, *available at* http://www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Reports-and-Publications/upload/stlhd-ffd.pdf (last visited Oct. 15, 2012).

The expert federal fisheries agency has identified increased in-stream sediment, particularly from timber harvest and road construction and use, as a leading cause of the decline that has led to protection of salmon populations under the Endangered Species Act. Threatened Status for Southern Oregon/ Northern California Coast Evolutionarily Significant Unit of Coho Salmon, 62 Fed. Reg. 24,588, 24,593 (May 6, 1997) ("Forestry has degraded coho salmon habitat through removal and disturbance of natural vegetation, disturbance and compaction of soils, construction of roads, and installation of culverts."); Threatened Status for the Oregon Coast Coho Salmon Evolutionarily Significant Unit, 76 Fed. Reg. 35,755, 35,766 (June 20, 2011) ("Historical and ongoing timber harvest and road building have reduced stream shade, increased fine sediment levels, reduced levels of instream large wood, and altered watershed hydrology.").

The harm from increased sediment in rivers and streams is not limited, of course, to salmon. Other fish and freshwater animals face similar difficulties from reduced oxygen, altered water chemistry, and limited visibility in murky streams. Bull trout, listed as a threatened species, are particularly sensitive to sediment pollution. When a federal expert biological agency specifically looked at the impacts of road management activities on bull trout, it noted that "[e]xisting roads are considered a primary source of sediment-related impacts to bull trout ... and were part of the rationale for listing bull trout as threat-

ened."[25] Aquatic invertebrates—prey for salmon and other fish—also decline in streams with increased sediment, as do aquatic plants due to less available sunlight. In short, while the word "pollution" may first bring to mind images of toxic chemical compounds, sediment from logging roads just as surely kills and harms fish and aquatic life in rivers and streams across the nation.

III. NON-POINT SOURCE CONTROLS DO NOT PROTECT WATER QUALITY FROM HARMFUL ROAD IMPACTS.

While Clean Water Act point source permitting programs have successfully reduced water pollution, non-point source programs under the Act have been ineffective. *See* National Research Council, ASSESSING THE TMDL APPROACH TO WATER QUALITY MANAGEMENT (2001) at 1 ("Although successful, the NPDES [point source permit] program has not achieved the nation's water quality goals of "fishable and swimmable" waters largely because discharges from other unregulated nonpoint sources of pollution have not been as successfully controlled. Today, pollutants such as nutrients and sediment ... are jeopardizing water quality....").

Best management practices, lauded by other amici, have largely failed.[26] Amici Pacific Legal Founda-

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[25] U.S. Fish and Wildlife Service, Biological Opinion of the Effects to Bull Trout and Bull Trout Critical Habitat from Road Management Activities on National Forest System and Bureau of Land Management Lands in Western Montana (2008) at 8, *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5336500.pdf (last visited Oct. 15, 2012).

[26] F.A. Espinosa *et al.*, *The Failure of Existing Plans to Protect Salmon Habitat in the Clearwater National Forest in Idaho,*

(*Footnote continued*)

tion touts the number of states with Best Management Practice programs for forestry generally, Pacific Legal Foundation Br. at 10-11, but those numbers are meaningless unless also linked to their efficacy. The continued identification of rivers and streams polluted by sediment from logging and industrial logging roads belies any claims that current measures to control this pollution are effective. The plight of the Pacific chorus frog in the photograph below, like the harm to salmon discussed above, serves as an indicator of the wider harm that entire aquatic ecosystems suffer when subjected to excess sediment pollution.

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JOURNAL OF ENVIRONMENTAL MANAGEMENT 49:205-30 (1997) (documenting the failure of Best Management Practices on U.S. Forest Service land to protect salmon and their habitat).

[27] Mud-caked Pacific chorus frog in spring breeding wetland habitat filled with sediment delivered from ditches of an adjacent logging road, Elliot State Forest, Oregon. March 15, 2007. Photo: C.A. Frissell.

In renewing protection for Oregon coast coho salmon, the federal expert biological agency particularly noted that Oregon's forestry rules do not adequately protect salmon.

> [S]ignificant concerns remain over the[] ability [of the Oregon forestry rules] to adequately protect water quality and salmon habitat. ... Since there are no limitations on cumulative watershed effects, road density on private forest lands, which is high throughout the range of this [salmon population], is unlikely to decrease.

76 Fed. Reg. at 35,767.[28] *See also* Scientific Conclusions of the Status Review for Oregon Coast Coho Salmon, NOAA Technical Memorandum NMFS-NWFSC-118 (June 2012) at 76-78 (documenting negative correlation between coho productivity and high logging road densities).[29] It is impossible to square these facts with the great praise heaped on best management practices in this case.

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[28] Oregon is not alone in having high road densities on private lands. As amici Pacific Legal Foundation notes (at 15, n.7), there may be up to six miles of forest road per square mile of private forest land in parts of California. The road less traveled, it appears, is not part of our nation's forested landscape.

[29] *Available at* http://www.nwfsc.noaa.gov/assets/25/8714_08132012_121939_SROregonCohoTM118WebFinal.pdf (last visited Oct. 15, 2012); *see also* J.C. Firman *et al.*, *Landscape Models of Adult Coho Salmon Density Examined at Four Spatial Extents*, TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY, 140:440-55 (2011) (finding that as road densities increased in small Oregon streams, spawning coho salmon decreased).

CONCLUSION

Industrial logging roads that channel sediment pollution through pipes and ditches directly into rivers and streams harm fish and other aquatic organisms. Until this direct pollution is addressed, the health of our nation's watersheds remains at risk. For the foregoing reasons, Amici respectfully ask this Court to affirm the decision below.

Respectfully submitted,

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